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BRIEF OF EMPLOYER, PETITIONERS

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-389

ALBERMARLE PAPER COMPANY, ET AL., *Petitioners,*

v.

JOSEPH P. MOODY, ET AL., *Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI FILED OCTOBER 7, 1974
CERTIORARI GRANTED DECEMBER 16, 1974

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I.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 474 F.2d 134 (4th Cir 1973). The decision and order of the United States District Court for the Eastern District of North Carolina is reported in ..... F.Supp ....., 4 FEP Cases 561 (E.D.N.C. 1971), and earlier rulings by that Court on various motions are reported at 271 F.Supp. 27, 1 FEP Cases 234 (1967); 2 FEP Cases 1002, 1081 (1970).

II.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on February 20, 1973. A timely petition for rehearing en banc was granted on June 25, 1973. After briefing to oral argument before the en banc court, a question of appellate procedure was certified to This Court by the Court of Appeals on December 6, 1973. The opinion of This Court on the question certified was delivered on June 17, 1974. Pursuant thereto, the Court of Appeals, on July 22, 1974, vacated its earlier order granting the petition for rehearing en banc and denied Petitioner's petition for rehearing. A petition for a writ of certiorari to the Court of Appeals for the Fourth Circuit was filed on October 7, 1974 and was granted on December 16, 1974.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

III.

STATUTES AND REGULATIONS INVOLVED

A. Section 703(h) of the Civil Rights Act of 1964, P. L. 88-352, 78 Stat. 255, 42 U.S.C. §2000e-2(h):

"Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d))."

B. Section 706(g) of the Civil Rights Act of 1964, P. L. 88-352, 78 Stat. 255, 42 U.S.C. §2000e-5(g):

"If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice). Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against

shall operate to reduce the back pay otherwise allowable."

* * *

C. Rule 23, Federal Rules of Civil Procedure.

D. The "Guidelines on Employment Selection Procedures" 35 F.R. 12,333 (August 1, 1970); 29 CFR §§1607.1-1607.14.

This has been reprinted in the Single Appendix hereto at pages 305-320.

IV.

QUESTIONS PRESENTED FOR REVIEW

A. Whether the District Court's refusal to enjoin Albemarle's use of employment tests was error as a matter of law.

B. Whether the Court of Appeals usurped the powers and function of the District Court by failing to remand the issues on testing.

C. Whether the District Court had traditional equitable discretion to determine whether back pay was an appropriate remedy.

D. Whether a class action for back pay under Rule 23 of the Federal Rules of Civil Procedure is inherently inconsistent with the Congressional intent behind the remedial provisions of Title VII, particularly as to class members who have not filed a charge with the Equal Employment Opportunity Commission.

V.

STATEMENT OF THE CASE

This is an action brought on August 25, 1966 by four black employees[1] of Petitioner's Roanoke Rapids, North Carolina pulp and paper mill as a private class action under Title VII of the Civil Rights Act of 1964. (A.6)[2]

The Kraft paper mill at Roanoke Rapids began operations in 1907, with a single paper machine producing about twenty tons of paper per day using unsophisticated wood procurement and preparation, and elementary papermaking operations, machinery and controls. (A. 88)

In the 1950's, Albemarle Paper Manufacturing Company, which had acquired the mill, began to modernize and install the technologically sophisticated machinery and equipment necessary to bring the mill to its present 1,000-ton per day capacity and to make the mill efficient and competitive with other mills. (Plaintiffs' Exhibit No. 30, p.56; Plaintiffs' Exhibit No. 36A, pp. 68-69)

Today the Roanoke Rapids mill is a modern, highly complex facility, employing approximately 650 people, which operates continuously, 24 hours a day, 7 days a week, 362 days a year.

A pulp and paper mill may be simply described[3] as a complex facility in which raw materials, principally wood,

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[1] One of the four, Theodore Daniels, has since withdrawn from case. *See* Order of the District Court entered July 19, 1971.

[2] References to the Single Appendix herein are designated (A. .....); references to the official transcript are designated (R. .....); other references to the record are made to the individual documents cited.

[3] The description of the papermaking process, *infra*, derives from Ainsworth, *Paper, The Fifth Wonder*, (2d Ed. 1959). The District Judge observed the process as it exists at the Roanoke Rapids Mill during his view of the facility. Defendant's Exhibit No. 19. *See also* Plaintiff's Exhibit No. 34A, pp. 321-367.

chemicals and water are combined in a cooking or digesting operation to separate wood fiber to be made into paper from the lignin and other materials found in the raw wood, the separated fiber in the form of pulp being delivered to complex, intricate paper milling machines and the residue lignin, chemicals, water and waste being recycled through massive recovery furnaces, precipitation and filtration equipment to recover the chemicals and to prevent air and water pollution.

Like nearly all paper mills, the Roanoke Rapids mill is organized into functionally distinct departments. In order to provide on-the-job training for functionally related jobs and to overcome the lack of an adequate specialized labor market in the locality, each of the departments is organized into functionally related lines of progression through which employees can move into more demanding jobs as vacancies occur, on the basis of seniority, ability and experience. Entry into a line of progression is generally from the Extra Board, a reservoir of employees available as needed to staff entry level jobs in the various lines of progression. (A. 88-89, 104)

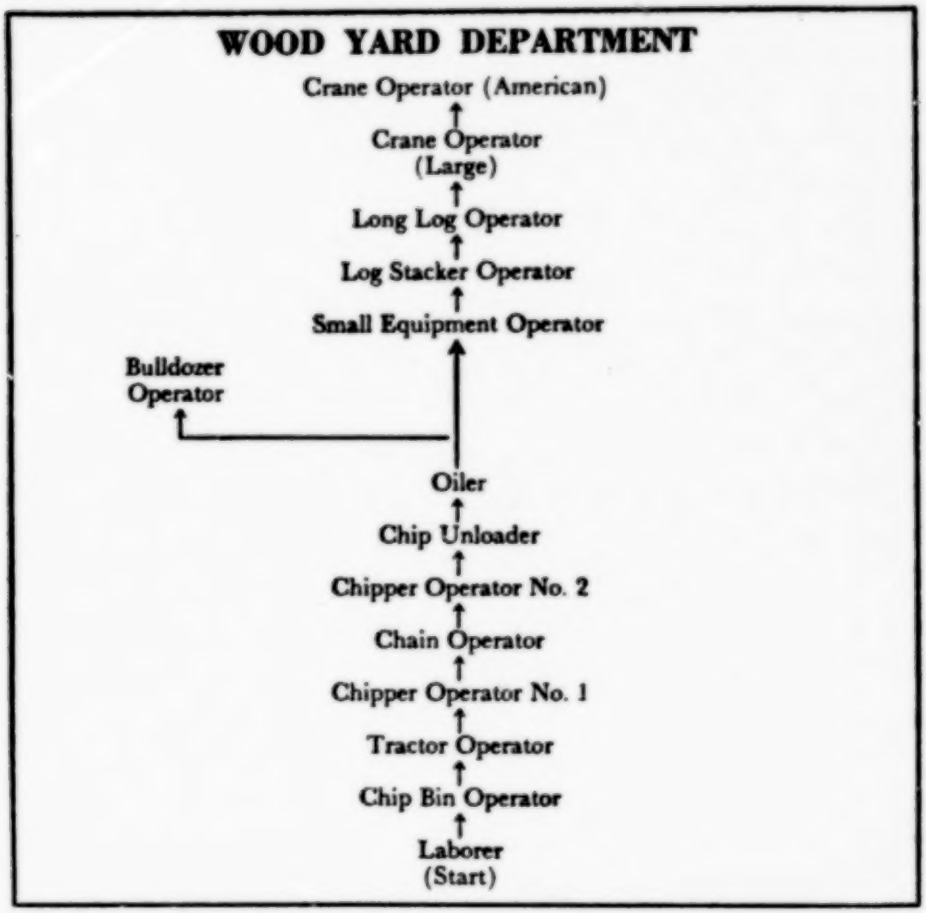
Each of the functionally distinct departments contributes to the central purposes of paper-making. The Woodyard Department gathers and prepares the wood for further processing.[4]

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[4] The wood is delivered (by both railroad and truck) in the form of chips, sawdust and logs. The Chip Unloader registers chips and sawdust receipts, records the condition of the particular shipment, operates a screen to take foreign matters out of the chips or sawdust, and then operates conveyor equipment to distribute the screened material.

Logs are unloaded by the Large Crane Operator and then are unloaded by the Long Log Stacker Operator. Next the logs are debarked and converted into chips by means of a conveyor system, debarking drums, and Chippers (Nos. 1 and 2). The Chain Operator controls the conveyor from the woodpile through the debarking drum. The Chipper

At the time of the trial in this case, the Woodyard Department was organized into a line of progression for seniority and promotion, training and flexibility of the workforce as follows (A.109):



Operator controls from the debarking drums through the Chippers. From the Chipper, the chips are conveyed to a chip bin controlled by the Chip Bin Operator. In the new (1967) modern long log operation, one man, the Long Log Operator, by remote control debarks and converts logs up to 40 feet in length into chips.

Auxiliary functions in the Woodyard are performed by the Oiler, who services the equipment in the Woodyard, the Bulldozer Operator, who spreads chips on the chip piles and reclaims chips for the conveyers, and the Small Equipment Operator, who operates small cranes, bulldozers and front-end loaders as needed in the Woodyard.

The Pulp Mill Department is concerned with the conversion of wood chips into pulp,[5] through a cooking operation in a chemical solution under high temperature and pressure to separate the wood fibers for subsequent conversion into paper, with the residues in the cooking solutions being sent to a recovery operation so that the very expensive chemicals can be reclaimed for subsequent recycling.[6]

At the time of trial in this case, the Pulp Mill Department was organized into lines of progression for seniority and promotion, training and flexibility of the workforce as follows (A. 109):

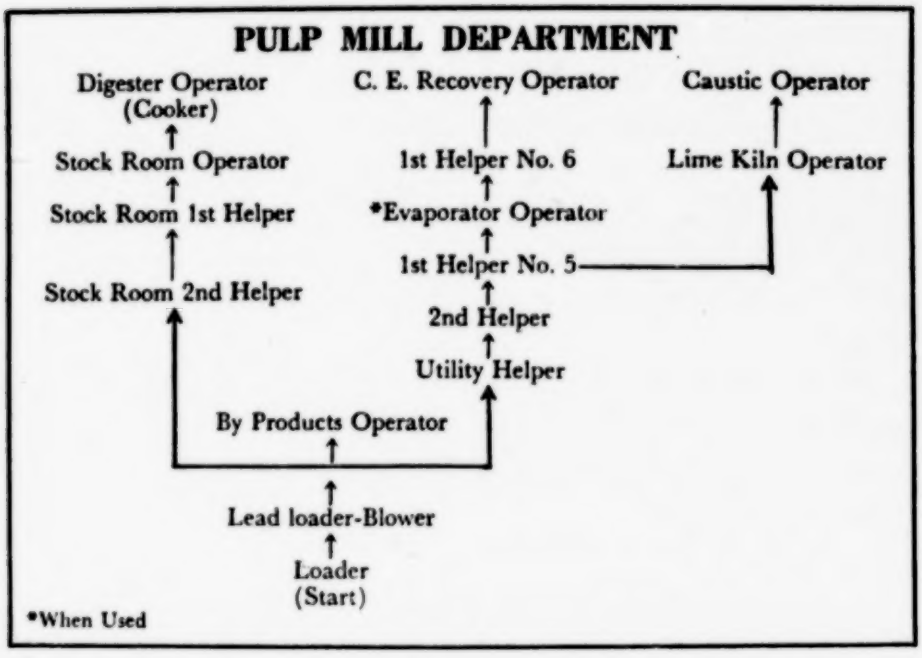
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[5] Soft wood is basically 50% cellulose, 30% lignin and 20% carbohydrates, etc. The cellulose is composed of innumerable fibers, finer than a human hair and 2 to 4 millimeters in length. The fibers are held together by the lignin. The pulp process separates the fibers by dissolving the lignin binder in chemical solutions, which in proper concentration does not seriously attack the fibers. The sodium chemicals used in the process are reclaimed and reused. While the basic process is simple, its accomplishment on a scale required by a modern paper mill is technologically complex.

[6] The cooking process is the responsibility of the Digester Operator, who directs the charging of the cookers with the proper mix of pine, hardwood chips, sawdust and chemical solutions and controls the temperature and pressures at which this operation must be carried out.

Following the cooking process, the cellulose fibers are washed clean and the clean fibers are then put in storage tanks for use on the paper machines. The washing operation is the responsibility of the Stock Room Operator with the assistance of the Stock Room 1st Helper and 2nd Helper.

The C. E. Recovery Operator, with the assistance of the 1st Helper No. 6, Evaporator Operator, 1st Helper No. 5, 2nd Helper, and Utility Helper, is responsible for the intricate process of operating the recovery boiler for purposes of reclaiming the chemicals used in the cooking process. In that connection, the Caustic Operator, with the help of the Lime Kiln Operator, is responsible for reclaiming lime for use in the cookers.



The B Paper Mill[7] is concerned with the conversion of pulp into paper.[8] At the time of trial in this case, the B

[7] At the time of trial, the mill also had an "A Paper Mill" which served the same functions as the B Paper Mill on a much smaller scale with less intricate machinery. The A Paper Mill is no longer in operation.

[8] From the Storage tanks at the end of the pulp operation, the pulp goes to the Stock Room (Seater Room in old mills), where it goes through refiners which cut the fibers into the desired lengths and reject that part of the pulp not usable.

After passing through the Stock Room, where the pulp is refined and subjected to chemical analysis by the Stock Room Operator helped by the Stock Room 1st and 2nd Helpers, the pulp is introduced into a Fordrinier paper machine. The pulp is there distributed in a thin layer onto a moving wire screen and then moves continuously through a series of presses and steam-heated driers which remove water, control thickness and convert the pulp into a continuous sheet of paper. This intricate pro[illegible] must be under the constant control of the work force, who must make the proper adjustments in speed of flow, pressure, temperature, and other factors in order to keep the paper of acceptable weight, moisture content and configuration. As the paper sheet leaves the paper machine, it is wound onto a reel. The

Paper Mill was organized into lines of progression for seniority and promotion, training and flexibility of the workforce as follows (A. 109):

B PAPER MILL DEPARTMENT

PAPER MACHINE	STOCK ROOM
Line of Progression	*Line of Progression*
Machine Tender	Stock Room Operator
↑	↑
Back Tender	Stock Room 1st Helper
↑	↑
Third Hand	Stock Room 2nd Helper
↑	
Fourth Hand	
↑	
Fifth Hand	
↑	
Sixth Hand	
↑	
Seventh Hand	
↑	
Spare Hand No. 4 (Start)	

In 1965, the Mill began operation of a technologically complex modern Power Plant Department to generate and distribute electric energy to the mill and steam to the Pulp Mill and Paper Mills in an amount necessary to supply the needs of a small city. (Plaintiffs' Exhibit No. 49, p. 139). This separate highly automated and controlled department is organized into a line of progression as follows (A. 109):

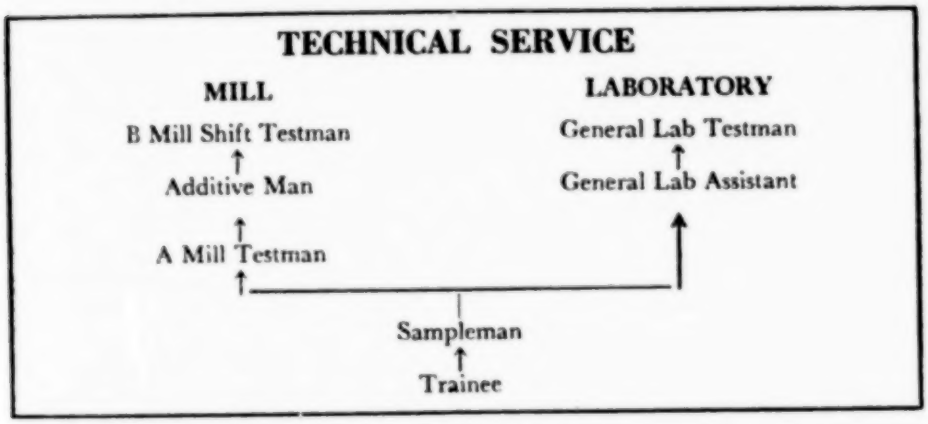
POWER PLANT DEPARTMENT

Power Plant Operator
↑
1st Helper
↑
2nd Helper
(Start)

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paper machine operates continuously. As one reel of paper is filled and removed, a new reel begins to wind without an interruption in the process. The reel is then transferred to a winder, where the paper is cut and sized.

The Technical Service Department is really the quality control department of the mill, controlling the quality of the raw materials used and of the products produced throughout the entire 24-hour-a-day operation. The quality control employees must have a working knowledge of physics and chemistry, although a college degree is not required. The department is organized into lines of progression as follows (A. 109):



There are also several additional support-function departments at the mill.[9]

With modernization of the mill in the early 1950's[10]

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[9] The Boiler Room Department operates small package boilers for the production of steam when a supplement is needed. (Plaintiffs' Exhibit No. 34A, pp. 364-365).

The Service Department services the whole mill with general labor services. (Plaintiffs' Exhibit No. 34A, pp. 330-331). There is also a Shipping Crew in the B Mill which weighs and bands the rolls of paper at the loading docks and places them in either freight cars or over-the-road trucks for shipment. (Plaintiffs' Exhibit No. 34A, pp. 341-344)

[10] Since that time, certain mill functions have been discontinued. The Kamyr Department, which prepared surplus pulp for sale to other mills, was discontinued in 1969. (A. 245) The Product Department B Mill Finishing Crew was discontinued in 1969. (A. 244) The A Paper Mill was shut down in August of 1971, restarted in part (one machine) in 1972, and shut down entirely again in 1974.

Albemarle found itself in need of a significantly greater number of skilled employees. (A. 346) The Company did not have such employees in its employ and there was no supply of skilled and experienced paperworkers in the local labor market. (A. 347-348) In an effort to develop and train its own pool of employees who could, with training, progress to higher skilled jobs in the lines of progression, Albemarle began to require that applicants for its skilled lines of progression have a high school education. (Plaintiffs' Exhibit No. 31, p. 219) When Albemarle found that the high school education requirement by itself was not an adequate predictor of job success, its Personnel Manager was directed to develop a better procedure for the selection of employees for successful progression in the skilled lines of progression. (A. 329, 339) The Personnel Manager, who was professionally trained in industrial psychology, selected the Revised Beta Examination (Beta)[11] and the Bennett Mechanical Aptitude Test (Bennett).[12] In order to verify that the tests were a useful predictor of job success, he undertook a "concurrent validation study" by comparing of the test results of a sampling of employees in the skilled lines of progression with supervisory ratings of the employees. (A. 99, 330) He determined that the Beta correlated positively with job performance (A. 330) and its use at the mill continued. (A. 99)[13] In 1963, as part of the continuing effort to improve the quality of its workforce, Petitioner

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[11] A professionally developed non-verbal test designed to measure the intelligence of illiterate and non-English speaking persons.

[12] A professionally developed test for mechanical ability and verbal skills.

[13] Petitioner found that the Bennett test did not validate for its operations and use of this test was discontinued sometime in 1963 or before. There is no evidence that any employee or potential employee was disqualified by reason of his score on Bennett.

added the Wonderlic Test Forms A and B[14] (A. 331) and, beginning in 1963, a new applicant for employment in the skilled lines of progression was required to have a high school education or its equivalent (A. 345) and to achieve a cut-off score of 100 on the Revised Beta Examination and 18 on either the Wonderlic A test or the Wonderlic B test. (A. 99, 100)

The purpose for which Albemarle had adopted the educational and testing requirements was better to predict employees' job success in the skilled lines of progression. At no time did Albemarle impose these requirements for jobs in unskilled lines of progression. In fact, by reason of changes in mill operation, merger of certain lines of progression, and Albemarle's efforts to apply these testing requirements only where needed, there was a continued reduction in the number of job categories to which the requirements applied during the entire period from the date of inception of the requirements to the date of trial. Thus, during the period up to September 23, 1968, applicants for entry into a total of fifteen lines of progression situated in eight departments were required to fulfill the testing requirements.[15] The collective bargaining agreement with the union effective September 23, 1968 permitted Albemarle to make

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[14] A professionally developed test of mental ability and reading skills.

[15] These were: Woodyard Department—Yard Crew line of progression; Pulp Mill Department—Digester Operator, C. E. Recovery Operator and Caustic Operator lines of progression; A Paper Mill Department—Paper Machine and Beater Room lines of progression; B Paper Mill Department—Paper Machine and Stock Room lines of progression; Product Department—Finishing Crew-Rewinder Operator, Finishing Crew Sheeter Operator and Shipping Crew lines of progression; Power Plant Department—Power Plant Operator line of progression; Technical Service Department—Mill and Laboratory lines of progression; and Boiler Room Department—Boiler Operator line of progression.

certain changes in the lines of progression at the mill and, as a result, Albemarle was able to reduce the test coverage to applicants for entry into a total of twelve lines of progression situated in six departments.[16] Thereafter, further automation and curtailment of certain mill operations occurred (A. 90, 231-232) and by the time of trial in 1971, applicants for entry into a total of only eight lines of progression, situated in four departments, were required to fulfill the testing requirements.[17]

Prior to the passage of the Civil Rights Act of 1964, there were predominantly white skilled lines of progression and predominantly black unskilled lines of progression. (A. 89) The skilled lines of progression led generally to the higher paying jobs in the mill. (Plaintiffs' Exhibit Nos. 12-15, Appendices A) The unskilled jobs, however, are among the highest paying jobs in the Roanoke Rapids area—jobs which paid on the average more than those of policemen, schoolteachers, and most other jobs in the area. (Defendant Albemarle's Exhibit Nos. 11-17).

At the time of passage of the Civil Rights Act of 1964, there were two Extra Boards, one feeding the skilled lines of progression and another feeding the unskilled lines of pro-

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[16] These were: Pulp Mill Department—Digester Operator, C. E. Recovery Operator and Caustic Operator lines of progression; B Paper Mill—Paper Machine and Stock Room lines of progression; Product Department (B Paper Mill)—Rewinder Operator, Sheeter Operator, and Shipping Crew lines of progression; Technical Service Department—Mill and Laboratory lines of progression; A Paper Mill Department—Paper Machine line of progression; and Power Plant Department—Power Plant Operator line of progression.

[17] These were: Pulp Mill Department—Digester Operator, C. E. Recovery Operator and Caustic Operator lines of progression; B Paper Mill Department—Paper Machine and Stock Room lines of progression; Power Plant Department—Power Plant Operator line of progression; and Technical Service Department—Mill and Laboratory lines of progression.

gression. Employees were placed on the respective Extra Boards either as new employees or by election to take Extra Board work rather than lay-off in cases of reduction in force. (A. 104) Prior to 1965, the Extra board for the skilled lines of progression was predominantly white, that for the unskilled lines was predominantly black. (A. 104)

With the passage of Title VII on July 2, 1964, to be effective July 2, 1965, Petitioner undertook a series of steps to insure that its employment practices would be in compliance with the law. Commencing in 1964, Petitioner began an affirmative recruiting program to obtain black graduates from high schools for its apprentice maintenance program and for its other skilled lines of progression. (Plaintiffs' Exhibit No. 32, pp. 531-533) While blacks had not been barred from taking the employment tests, after passage of Title VII, Albemarle affirmatively sought to have all of its black employees who had a high school education take the tests so as to make them eligible for transfer into skilled lines of progression. (A. 105) Thereafter, in 1965, Petitioner waived the educational requirement as to all incumbent employees and again sought to have all black employees take the tests. (A. 105) In conjunction with the union, Petitioner in 1968, organized and funded a school at which its employees could acquire the verbal skills necessary to perform jobs in the skilled line of progression. (R. 1181-1186).

As the law developed under Title VII it became apparent that seniority systems or other work conditions which were racially neutral but which had the effect of perpetuating past discrimination could be found violative of the Act.[18]

In light of the judicial interpretations of the Act, Peti-

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[18] In *Quarles* v. *Philip Morris,* 279 F.Supp. 505, 516 (E.D. Va. 1968), the Court found "it is also apparent that Congress did not intend to freeze an entire generation of Negro employees into dis-

tioner, at the first opportunity, took further affirmative measures to ensure equal opportunities. In 1968, the two Extra Boards were merged into a single board. (A. 245-246) Employees who had formerly been in unskilled lines of progression were given temporary assignments to skilled lines even though such employees did not meet test and educational requirements, if it reasonably appeared from past experience that the employees might be able to do some of the lower jobs in the skilled lines of progression. (A. 246)

The collective bargaining agreement at the Roanoke Rapids mill which ran for the term September 18, 1965 through September 15, 1968, provided a system of "job seniority" in a line of progression for advancement. (A. 286-290) There was a provision for transfers from one line of progression to another and from one department to another, but there was no seniority right to transfer and the transferee did not carry either his rate of pay or his seniority with him. It thus appeared to the Company that under the developing law the seniority provisions of the collective bargaining agreement at Roanoke Rapids "tended to perpetuate past discrimination" as had the seniority provisions involved in *Quarles* and *Crown-Zellerbach*.

Therefore, in 1968, in the first contract negotiations following the *Quarles* and *Crown-Zellerbach* decisions, the

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criminatory patterns that existed before the act," and held a seniority system which tends to perpetuate past discrimination is not bona fide under Section 703(h) of Title VII.

On March 26, 1968, the United States District Court for the Eastern District of Louisiana, in the case *of United States* v. *Local 189, Papermakers Union (Crown-Zellerbach)*, 301 F.Supp. 906 (E.D. La. 1969) *aff'd.*, 416 F.2d 980 (5th Cir.), *cert. denied*, 397 U.S. 919 (1970) entered a temporary injunction ordering the Crown-Zellerbach Corporation to abolish the "job seniority" system at its paper mill in Bogalusa, Louisiana, and to replace it with a "mill seniority" system with transfer provisions including carrying seniority to a new job with red-circling of rates.

Company and the Unions negotiated a contract clause to provide for transfers on the basis of "mill seniority," [19] for the carrying of "mill seniority" with the transferee for purposes of advancement and for the "red-circling" of the transferee's rate of pay (i.e., if an employee transferred to a lower paying job, he would be paid his old rate of pay until his rate in the new line of progression caught up to his old rate). (A. 98) This collective bargaining agreement was for a term beginning September 23, 1968. The relevant seniority provisions were sections 10.2.2 and 10.2.3. (A. 292-293)

In May, 1966, charges were filed with the Equal Employment Opportuntity Commission by Joe P. Moody, Theodore Daniels, Henry Hill and Arthur Mitchell, alleging discrimination because of their race. (A. 273-282)

These charges were served on defendants on August 11, 1966, and the EEOC investigator gave defendant, Albemarle Paper Manufacturing Company, fifteen days, i.e., until August 26, 1966, to answer. However, before the Company could respond, on August 24, 1966 the first EEOC Guidelines on Employment Testing Procedures[20] were published and on August 25, 1966 the complaint in this case was filed in the United States District Court for the Eastern District of North Carolina. (A. 6-10) The Complaint simply alleged in very general terms discrimination on account of race against Plaintiffs in violation of Title VII. The prayer was for injunctive and other equitable relief on behalf of Plaintiffs and the class they claimed to represent. (A. 10) By motion for summary judgment, Albemarle immediately raised the question whether Plaintiffs could bring a class action

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[19] While the contract did not, strictly speaking, provide for mill seniority, the system negotiated was tantamount to mill seniority. (A. 233-234)

[20] BNA, Daily Labor Report No. 174 (Sept. 7, 1966).

under Rule 23.[21] (See Motion for Summary Judgment filed October 5, 1966.) In their brief in opposition to that motion, Plaintiffs maintained the position:

> "It is important to understand the exact nature of the class relief being sought by Plaintiffs. *No money damages are sought for any member of the class not before the Court, nor is specific relief sought for any member of the class not before the Court.* The only relief sought for the class as a whole is that defendants be enjoined from treating the class as a separate group and discriminating against the class as a whole in the future." (A. 13-14) (Emphasis added).

The District Judge, John D. Larkins, Jr., overruled the motion for summary judgment, but in the same order granted a motion to dismiss the International Union as a defendant on the ground it had not been named in the charges filed with the Equal Employment Opportunity Commission. (A. 16-20)

Following Judge Larkins' ruling, the case proceeded to the discovery stage. While the case was in this posture, on October 31, 1968, the assets of the Mill were sold to Hoerner Waldorf Corporation, a Delaware Corporation, which in turn assigned them to a new Albemarle Paper Company, a Delaware Corporation. The proceeds of the sale were assigned to First Alpaco Corporation which later merged into Ethyl Corporation, the parent of the old Albemarle Paper Company.[22] (Plaintiffs' Exhibit 36B pp. 67-69)

On March 12, 1970, the United States District Court for the Middle District of North Carolina, decided the case of

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[21] FED. R. CIV. P. 23.

[22] For convenience, the term "Albemarle" is used in referring to the employer of Respondents.

Robinson v. *Lorillard Corp.*, 319 F.Supp. 835 (M.D.N.C. 1970) *aff'd.* 444 F.2d 791 (4th Cir.), *petition for cert. dismissed,* 404 U.S. 1006 (1971), in which District Judge Eugene A. Gordon, in a Title VII case, on motion first made after his findings on the merits of the case, *in his discretion,* allowed damages in the form of back pay. Thereafter, in 1970, the issue of damages was injected into this case for the first time. (A. 28-29) On June 25, 1970, Plaintiffs moved to join Hoerner Waldorf Corporation, Ethyl Corporation, First Alpaco Corporation and the new Albemarle Paper Company (Delaware) as parties defendant. The old Albemarle Paper Company (Virginia) filed a motion to dismiss on August 20, 1970. The District Judge, John D. Larkins, Jr., issued his opinion and order on these motions on September 29, 1970, (A. 30-39) denying the motion to dismiss, permitting the joinder of the parties defendant[23] and stating:

> "Rule 54(c) of the Federal Rules of Civil Procedure provides in part: 'except as to a party against whom a judgment is entered by default every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.' The possibility of an award of money damages upon a determination of liability is still with us. It is not yet the proper time to drop the plaintiffs' claims, which are, at least, litigable." (A. 37-38)

Following This Court's decision in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), the management at the Mill promptly employed Dr. Joseph Tiffin, a professor at Purdue University, and an eminent industrial psychologist. Using the standard "concurrent" method of validation, Dr. Tiffin

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[23] Process was never served on First Alpaco Corporation and it has never participated in this case.

conducted further validation studies on the tests in use for certain of the skilled lines of progression. (A. 165-166) As a result of his study, Dr. Tiffin concluded that the tests could reasonably be used for both hiring and promotion for most of the jobs in the Mill. (A. 438)

In the meantime, this case was transferred from Judge John D. Larkins, Jr. to Judge Franklin T. Dupree, Jr., who, at a conference of attorneys on May 17, 1971, on motion of Defendant, ordered the case set for trial beginning at 10 a.m., July 26, 1971, at Raleigh, North Carolina.

First on May 28, 1971 and again on June 15, 1971, the District Court ordered plaintiffs to answer Defendants supplemental interrogatory, which read:

> "List the specific names of each employee or former employee whose personnel record or records in any way establishes or tends to establish any discrimination by Albemarle Paper Company in its employment practices and explain how such a record or records show discrimination giving the specific dates and instances." (A. 44, 46).

By order dated July 8, 1971, the District Judge defined the class, provided for notice to the class, ruled that damages might be recovered in this action and stated his intention to have all such claims for individual monetary relief tried with other issues at the trial, reserving the right to refer some of such issues to a master if the claims were too numerous or complicated to be completed at trial. (A. 50-52)

On July 10, 1971, the parties agreed to a Stipulation of Facts, which included most of the relevant facts in the case, (A. 86) and on July 19, 1971, the parties agreed to and executed an elaborate pretrial order.

In the Pretrial Order, Plaintiffs listed 134 witnesses of whom 128 were:

> "Black employees or former employees of Albemarle Paper Company who may be called to testify about their terms, conditions, privileges of employment such as jobs held, wages received and testimony going to the question of backpay." (See Pretrial Order entered July 19, 1971 at pp. 78-90)

The case came on for trial before the Honorable Franklin T. Dupree, Jr., promptly at 10:00 a.m., Monday, July 26, 1971. There were four major issues: (1) Whether there should be injunctive relief with respect to the seniority system at the mill; (2) whether the testing and high school educational requirements were unlawful; (3) whether there should be back pay and (4) whether there should be attorney fees.

In an effort to reduce the scope of the trial, Albemarle consented to the entry of an order providing mill seniority and red-circle rates for members of the class by representing in its opening statement as follows:

> "If the Court please, I think there are four issues here and I will address myself to them very briefly. First, the injunctive relief. The defendants believe that no injunction is warranted in this case. We believe that whatever relief they may have been entitled to some years ago we took care of in 1968, and that under the circumstances we would fight very hard not to be enjoined. However, without admitting any violation of Title VII, we have concluded to say to your Honor this morning that insofar as an injunction to provide plant seniority for these people along the lines of the system that we set forth in the proposed consent agreement, a copy of which I have left on your desk, we would not burden the Court today with all the evidence that we

> think bears on that issue. I think it's all in the depositions. And without admitting any guilt on our part, we can eliminate that part of the case because we would not object to an order along those lines." (A. 114-115)

The trial of the case consumed eight full trial days and one day for the Court to view the Mill. There were literally scores of members of Plaintiffs' class in attendance at the trial. The District Judge did not limit the evidence in any way. Plaintiffs called eleven employee, or former employee, witnesses and introduced the depositions of five others.

The District Judge made extensive findings of fact, found the Company's testing program "job-related" and declined to enjoin its use. In his discretion the Judge denied back pay to plaintiffs. However, the Court ordered a mill seniority system and, finding the tests sufficient for the purpose, proscribed the use of a high school education requirement for employment. (See A. 497, 499-502)

Plaintiffs appealed to the United States Court of Appeals for the Fourth Circuit and the case was heard by a panel, consisting of Circuit Judge J. Braxton Craven and Senior Circuit Judges, Herbert S. Boreman and Albert V. Bryan, whose decision is best explained by them:

> "The district court refused to order the abolition of or changes in the pre-employment testing procedures used by Albemarle. Plaintiffs appeal from the district court's determination. Judge Boreman concurs with Judge Craven in reversing and remanding to the district court on this issue. Judge Bryan dissents.
>
> "The district court also refused to award the plaintiffs back pay. Judge Bryan concurs with Judge Craven in reversing the district court on this issue. Judge Boreman dissents.

> "The effect of this division in the court is to reverse and remand the district court's determination as to the testing procedures and the refusal to award back pay." (A. 531)

Defendants asked for a rehearing and made a suggestion of rehearing en banc which was granted on June 25, 1973. Supplemental briefs were filed and argument was heard on October 2, 1973.

On December 6, 1973, Chief Circuit Judge Clement F. Haynsworth certified to This Court the following:

> "Under 28 U.S.C. §46 and Rule 35 of the Federal Rules of Appellate Procedure, may a senior circuit judge, a member of the initial hearing panel, vote in the determination of the question of whether or not the case should be reheard *en banc*?" (A. 540)

The certification also stated:

> "If the *en banc* court reaches the merits, the tentative vote is that it will modify the panel decision with respect to an award of back pay." (A. 540)

On June 17, 1974 This Court answered the certified question in the negative and on July 22, 1974 the United States Court of Appeals for the Fourth Circuit denied Defendants' petition for rehearing.

On October 7, 1974 Defendants filed a petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit with This Court. The writ was granted on December 16, 1974.

VI.

SUMMARY OF ARGUMENT

A. The District Court Correctly Refused To Enjoin The Use Of Albemarle's Testing Procedures.

1. Introduction

This case involves the interpretation of principles laid down in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1970), with respect to the use of employment tests.

2. The Evidence In This Case Shows Albemarle's Tests Were Not Discriminatory.

There was no demonstration in the trial court that Albemarle's tests, the Beta and the Wonderlic A & B, had a racially disparate effect upon a proper statistical universe —i.e. otherwise qualified blacks employed in, or candidates for employment at the Roanoke Rapids mill. *Mayor* v. *Educational Equality League,* 415 U.S. 605, 620 (1974). The tests not having been shown to discriminate in the first place, there was no basis to proscribe their use. *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973); *Bridgeport Guardians, Inc.* v. *Civil Service Commission,* 482 F.2d 1333 (2d Cir. 1973); *Hester* v. *Southern Railway Co.,* 497 F.2d 1374 (5th Cir. 1974); *Woods* v. *North American Rockwell Corp.,* 480 F.2d 644 (10th Cir. 1973).

3. Albemarle Demonstrated The Tests To Be A Reasonable Measure Of Job Performance.

(a) *The District Court Found That Albemarle's Tests Were Job Related.*

The District Court found, based in part on a view of the mill, that certain native intelligence and reading skills were required for the safe and efficient operation of the mill. That Court also found that Albemarle's tests had

undergone validation studies and had been proven to be job related.

(b) *The Findings Of The District Court Have Not Been Shown To Be Erroneous.*

The attack on the tests in the Court of Appeals was not that the tests were not job related, but that Albemarle had not proven them to be job-related in strict accordance with the EEOC Guidelines. The proper test is not compliance with the guidelines, *Espinoza* v. *Farah Manufacturing Co.,* 414 U.S. 86, 94 (1973), but whether the tests are proven job related to the satisfaction of the Court. *Vulcan Society* v. *Civil Service Commission,* 490 F.2d 387, 394 (2d Cir. 1973); *Castro* v. *Beecher,* 459 F.2d 725 (1st Cir. 1972); *Bridgeport Guardians, Inc.* v. *Civil Service Commission,* 482 F. 2d 1333 (2d Cir. 1973); *United States* v. *Georgia Power Co.,* 474 F.2d 906 (5th Cir. 1973). Relying primarily on the guidelines and on contentions of fact raised for the first time on appeal, the Court of Appeals erroneously found fault with Albemarle's proof of job relatedness.

(i) Job Analysis

Albemarle's expert conducted an empirical validation study which correlated test scores with supervisory ratings of actual job performance. In such a situation a written job analysis is unnecessary and its absence is irrelevant to the integrity of the correlations.

(ii) Supervisor Ratings

Test validations do not fail as a matter of law upon an unsupported presumption that supervisors' ratings are racially biased. *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973). There is no basis for a presumption of supervisors' bias in the first place and such bias clearly could not have affected the correlations obtained in this case.

(iii) Business Necessity

The objections raised concerning the use of a test for lines of progression in which the test had not been specifically shown to validate are based primarily on the Court of Appeals' misassumption of facts and, in any event, go to the utilization of the tests, not their job-relatedness. The actual use made of the tests by Albemarle is reasonable and lawful.

B. In Any Event The Court Of Appeals Erred In Not Remanding The Testing Issue To The District Court.

When new standards of proof are set forth, simple fairness requires the party against whom the new rule is invoked be afforded an opportunity to present its evidence. *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 807 (1973); *England* v. *Louisiana Medical Examiners,* 375 U.S. 411 (1964); *United States* v. *Georgia Power Co.,* 474 F.2d 906 (5th Cir. 1973). Especially is this true where, as here, the Court of Appeals engaged in its own determination of the facts.

C. The District Court Had Traditional Equitable Discretion To Determine Whether Back Pay Was An Appropriate Remedy.

1. Title VII Leaves The Award Or Denial Of Back Pay To The General Equitable Discretion Of The District Courts.

The plain language of the Statute expressly vests the District Court with the discretion to fashion remedies as "may" be appropriate, which "may include reinstatement or hiring of employees, with or without back pay." Section 706(g), 42 U.S.C. §2000e-5(g). The Fourth Circuit's reversal of the District Judge's denial was based on its adoptive "special circumstances" standard. This standard, which mandates an award of back pay in every instance

save exceptional cases, contravenes the legislative intent behind the express language of the Act. *Curtis* v. *Loether,* 415 U.S. 189 (1974); *Kober* v. *Westinghouse Electric Co.,* 480 F.2d 240 (3d Cir. 1973); 111 Cong. Rec. 12819 (1964).

2. The Discretion Of A Trial Court Regarding The Back Pay Remedy Should Be Guided By Traditional Equitable Principles.

Trial courts in fashioning decrees to remedy violations of Title VII should be free to apply equitable considerations in light of all the facts and circumstances of the case. Two of those factors were cited by the District Judge below: the good faith of Albemarle, and the plaintiffs' tardiness, amounting to laches, in presenting the back pay claims. *United States* v. *Georgia Power Co.,* 474 F.2d 906 (5th Cir. 1973); *Rental Development Corp. of America* v. *Lavery,* 304 F.2d 839, 842 (9th Cir. 1962).

3. Even Under A "Special Circumstances" Standard, The District Court Was Justified In Denying Back Pay.

Even if a "special circumstances" rule is correct, the factors cited by the District Court make this an exceptional case.

D. Back Pay Should Not Be Awarded To Class Members Who Did Not File Charges With The Equal Employment Opportunity Commission.

Back pay is individual redress for damages actually suffered as distinct from class wide prospective remedial measures. The previous filing of a charge with the EEOC is a jurisdictional requirement for individuals seeking relief under Title VII. *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973). The device of a class action under Rule 23 of

the Federal Rules of Civil Procedure may not be manipulated to confer jurisdiction over such individual claims where it does not otherwise exist. FED. R. CIV. P. 82; *Zahn* v. *International Paper Co.*, 414 U.S. 291 (1973); *Snyder* v. *Harris*, 394 U.S. 332 (1969); *Weiner* v. *Bank of King of Prussia*, 358 F. Supp. 684 (E.D. Pa. 1973); *Sperberg* v. *Firestone Tire & Rubber Co.*, 61 F.R.D. 70 (N.D. Ohio, 1973).

VII.

ARGUMENT

A. The District Court Correctly Refused To Enjoin The Use Of Albemarle's Testing Procedures.

1. INTRODUCTION

This case presents to the Court several questions either not reached or not definitively settled in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). In *Griggs* the Court considered the use of a standardized general intelligence test as a condition of employment in or transfer to jobs when (a) the standard is not shown to be significantly related to successful job performance, (b) the requirement operates to disqualify Negroes at a substantially higher rate than white applicants, and (c) the jobs in question formerly had been filled only by white employees.

In this case the District Court found that the jobs in Albemarle's skilled lines of progression formerly had been filled only by white employees, made no finding with respect to whether Albemarle's tests had a disparate racial effect, and finally found that, in any event, Albemarle's tests were significantly related to successful job performance.

2. THE EVIDENCE IN THIS CASE SHOWS ALBEMARLE'S TESTS WERE NOT DISCRIMINATORY.

In any Title VII case, plaintiff bears the burden of showing *prima facie* discrimination. *McDonald Douglas Corp.* v. *Green,* 411 U.S. 792, 802 (1973); *Woods* v. *North American Rockwell Corp.,* 480 F.2d 644, 647 (10th Cir. 1973). In the testing context plaintiffs most often make this showing with statistics from tests previously administered by the defendant employer. *Castro* v. *Beecher,* 459 F.2d 725 (1st Cir. 1972); *Bridgeport Guardians, Inc.* v. *Civil Service Commission,* 482 F.2d 1333 (2d Cir. 1973); *United States* v. *Georgia Power Co.,* 474 F.2d 906 (5th Cir. 1973); *Carter* v. *Gallagher,* 452 F.2d 315 (8th Cir.), *cert. denied,* 406 U.S. 950 (1972). But whatever the method, failure to show that a test has a disparate effect on the minority group has been and should be fatal to a Title VII plaintiff's case, *Bridgeport, supra* at 1339; *Hester* v. *Southern Railway Co.,* 497 F.2d 1374, 1381 (5th Cir. 1974); *Woods, supra,* at 647.

This threshold question of whether Albemarle's tests had a disparate effect on the members of the class in this case was never specifically addressed in the District Court and the District Court made no findings of fact as to any discriminatory effect of the tests. Indeed, plaintiffs' proposed findings did not even include a provision bearing on this issue.

The *Amicus Curiae,* Equal Employment Opportunity Commission (hereinafter EEOC), tried to correct this glaring deficiency in plaintiffs' case, in its brief[24] to the Court of Appeals. Purportedly utilizing plaintiffs' Exhibit No. 10,[25]

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[24] All briefs filed in the Court of Appeals were included in the record sent to this Court.

[25] Exhibit No. 10 is supposedly a composite of all of Albemarle's personnel records, which plaintiffs had taken two weeks to microfilm. No

Amicus Curiae contended that it showed that on Wonderlic A blacks averaged 17 and whites averaged 24.9, with 96% of the whites and 64% of the blacks obtaining a passing score, and that on Wonderlic B blacks averaged 14.8 and whites averaged 21.9. *Amicus Curiae* did not point out that the same exhibit also showed that on the Beta, blacks averaged 104.20, whites 107.56 against a cut-off score of 100.00. But in their Supplemental Brief on Rehearing at page 36, the *Amici Curiae* (the EEOC now joined by the United States) conceded:

> ". . . the evidence on the Beta alone showed only a slight, and perhaps not statistically significant impact." (Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae on Rehearing En Banc, p. 36).

Nevertheless, the majority panel of the Court of Appeals began its discussion of testing by noting:

> "The plaintiffs made a sufficient showing below that Albemarle's testing procedures have a racial impact." (A. 515)

In support of that conclusion the Court of Appeals Panel cited in a footnote some statistics concerning the Wonderlic tests, but never mentioned the Beta.

Thus, the finding by the Court of Appeals Panel is first of all grievously and astonishingly deficient in enjoining Albemarle's use of the Beta, as to which there was absolutely no evidence, either presented to the District Court or otherwise, to show a disparate racial effect. As Dr. Richard Barrett

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specific contentions based on Exhibit No. 10 were ever made in the District Court despite Albemarle's strenuous efforts to elicit them. (See R. 52-54.)

pointed out in his article, Barrett, *Gray Areas in Black and White Testing,* 46 Harv. Bus. Rev. 92, 93 (1968):

> "A test that places no special obstacle in the path of Negro applicants cannot be said to be discriminatory."[26]

As a consequence of this failure of proof by plaintiffs, Albemarle is clearly entitled to a reversal of that portion of the Court of Appeals' judgment proscribing further use of the Beta.

But even as to Wonderlic, plaintiffs' proof is deficient on the threshold question of whether the test was discriminatory. The Court of Appeals Panel concluded that this requirement was satisfied by reference to Exhibit No. 10 and to general statistics. But, while these factors may be the basis for speculation that the Wonderlic tests exclude more blacks than whites, they are not proof of discriminatory effect at the mill at Roanoke Rapids.

The calculation and factual extrapolation from Exhibit No. 10 was never presented to the District Court; in fact, it was before the Court of Appeals that the possibility was first raised that Exhibit No. 10 could be utilized as proof of disparate effect, and then the suggestion was made not by plaintiffs, but by the *Amicus Curiae,* EEOC. The District Court thus was never afforded an opportunity to consider the force of this supposed evidence.[27] Further, Albemarle was never afforded the opportunity to demonstrate at trial that the conclusion drawn by the EEOC and the Court of Appeals

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[26] This conclusion was confirmed by plaintiffs' other expert, Dr. Katzell, as well. (A. 403).

[27] Nor was the District Court ever given the study, E. F. Wonderlic and Assoc. Inc., *Negro Norms, A Study of 38,452 Job Applicants for Affirmative Action Programs* (1972) because it was filed for the first time with the Court of Appeals and served on counsel for Albemarle along with Appellants' Reply Brief in August, 1972.

from Exhibit No. 10 was erroneous for the reason that the statistical universe included test scores of employees who could hardly read or write and whose verbal facility was no more than 1 on the Wonderlic (R. 1135-6), and who were therefore not potential candidates for the skilled lines of progression.[28]

Having failed to prove disparate effect of the tests at trial, plaintiffs may not rely on the suggestion in *Griggs*, 401 U.S. at 430, n. 6, that the Wonderlic has been shown to have a disparate effect in other cases. If meaningful conclusions are to be drawn a test "must be evaluated in the setting in which it is used." *Georgia Power, supra* at 912.[29] A rule to the contrary, aside from being illogical, would be inequitable in imposing the heavy financial burden of validation on an employer even though his tests do not discriminate against minorities. In other words, if the test does not discriminate in the first place, it should not have to be validated.

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[28] Since the District Court found that ability to read and write is a job and safety requirement for the skilled lines of progression, the inclusion of illiterate persons in the statistics relied on by the Court of Appeals renders its conclusions about differential impact meaningless. This Court has recognized with respect to racial statistics that unless "the relevant universe for comparison purposes" is limited to potentially qualified persons, "simplistic percentage comparisons undertaken by the Court of Appeals lack real meaning." *Mayor* v. *Educational Equality League*, 415 U.S. 605, 620 (1974). And see *Harper* v. *Mayor and City Council of Baltimore*, 359 F. Supp. 1187, 1193 (D. Md.), *modified, sub nom. Harper* v. *Kloster*, 486 F.2d 1134 (4th Cir. 1973); *Chance* v. *Board of Examiners*, 330 F. Supp. 203, 214 (S.D. N.Y. 1971); *aff'd.*, 458 F.2d 1167 (2nd Cir. 1972).

[29] Even Dr. Katzell, one of plaintiffs' experts, acknowledged that, in order to determine whether a particular test has a racially disparate impact, it would be necessary to study its impact upon the particular group involved. (A. 394-5).

3. Albemarle Demonstrated Its Tests To Be A Reasonable Measure Of Job Performance.

This Court held in *Griggs* at page 436:

> "Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance."

Thus, the question presented here is whether, even if the unproven assumption that Albemarle's tests had a racially disparate effect were accepted, the Court of Appeals could hold as a matter of law that Albemarle failed to make an adequate demonstration that its tests are a reasonable measure of job performance. Albemarle submits that the Court of Appeals was in error in making that determination.

(a) *Defendants' Tests Were Found To Be Job Related By The District Court.*

The tests used by Albemarle were professionally developed to measure the very attributes found by the District Court to be required for the skilled lines of progression. The Beta measures the intelligence of the taker, *even though he is illiterate,* (Katzell deposition, A. 360-2); the District Court found that a high degree of native intelligence was a necessary attribute for workers in the skilled lines of progression. (A. 494) The Wonderlic tests also measure general mental ability and indicate the taker's ability to read and to understand what he has read. (Katzell deposition, A. 362-3); the District Court found that reading ability was also a necessary requirement for workers in the skilled lines of progression. (A. 497) Without more, therefore, it would appear that the

tests were reasonable measures of a prospective employee's ability to perform the skilled jobs in the mill.

But Albemarle's case does not rest merely upon this basis since, through validation studies, Albemarle's tests were found to correlate significantly with actual job performance at the mill. Before use of the Beta was instituted, in 1958, a concurrent validation study established positive correlations.[30] Further, after this Court's decision in *Griggs*, Albemarle retained an unquestioned expert in industrial psychology to conduct a further validation study.[31] As found by the District Court this study confirmed the validity and utility of the tests:

> "This court has also found as a fact that a certain level of native intelligence is required for the safe and efficient operation of Albemarle's often complicated and sophisticated machinery. The personnel tests administered at the plant have undergone validation studies and have been proven to be job related. The defendants have carried the burden of proof in proving that these tests are "necessary for the safe and efficient operation of the business" and are, therefore, permitted by the Act. However, the high school education requirement used in conjunction with the testing requirements is unlawful in that the personnel tests alone are adequate to measure the mental ability and reading skills required for the job classifications." (A. 497)

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[30] See, supra, p. 11.

[31] The study was conducted by use of the "concurrent validation" method. Ten skill-related job groupings were selected on the basis of skill level and content of the jobs, as being typical of jobs in the skilled lines of progression. Each employee in each group was rated in comparison with each other employee in the group to obtain a ranking of job performance and statistical correlation was performed to determine correlation between job performance and test results. (A. 490). The same method was also expressly approved in *Watkins* v. *Scott Paper Co.*, ___ F. Supp. ___, 6 FEP Cases 511, 537 (S.D. Ala. 1973).

It is clear, therefore, that the District Judge, who was the trier of fact in this case, had no doubt that Albemarle had demonstrated that its tests were related to performance on the job.

(b) *The Findings Of The District Court Have Not Been Shown To Be Erroneous.*

Plaintiffs' contention in the Court of Appeals was not that Albemarle's tests were not job related (indeed the EEOC's Brief to the Court of Appeals as *Amicus Curiae* at p. 32 conceded that "they may very well be job related"). Rather, plaintiffs contended that Albemarle had not proven job relatedness in the manner required by the EEOC guidelines in that (1) Dr. Tiffin's study had not been shown to have fulfilled all of the technical requirements of the guidelines, and (2) Dr. Tiffin had not been shown to have gone through all the procedures detailed in American Psychological Association, Inc., *Standards for Educational and Psychological Tests and Manuals* (1966) (Plaintiffs Ex. 71), and that Albemarle had not presented evidence on extraneous issues not raised in the District Court.

Other Courts of Appeals reaching the question have held that an employer may satisfy the job relatedness standard of *Griggs* independently of the specific requirements of the EEOC guidelines. *Castro* v. *Beecher,* 459 F.2d 725, 737-38 (1st Cir. 1972); *Guardians Ass'n* v. *Civil Service Commission,* 490 F.2d 400, 403 n. 1 (2nd Cir. 1973); *United States* v. *Georgia Power Co.,* 474 F.2d 906, 913 (5th Cir. 1973). The error of the Court of Appeals panel below was in equating EEOC suggested technical methodology with acceptable standards of judicial proof of job relatedness. "Experience teaches that the preferred method of today may be the re-

jected one of tomorrow.[32] What is required is simply that an examination must be 'shown to bear a demonstrable relationship to successful performance of the jobs for which it was used,' *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431." *Vulcan Society* v. *Civil Service Commission,* 490 F.2d 387, 394 (2d Cir. 1973) (Friendly, J.) (Footnote added).

Previous opinions of this Court make clear that deference to agency interpretation should be limited, when, as here, the interpretation derives from a nonadversary proceeding, *Fishgold* v. *Sullivan Drydock and Repair Corp.*, 328 U.S. 275 (1946), and when the interpretation intrudes into an area where a court's expertise exceeds the agency's.[33] In the case of testing, the EEOC guidelines have not been subject to adversarial scrutiny. The 1970 guidelines themselves state:

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[32] The First "Guidelines on Employment Testing Procedures" (Plaintiffs Ex. 27A) adopted by the EEOC on August 24, 1966, one day before this case was brought stated *inter alia:*

> "The Commission accordingly interprets 'professionally developed ability to test' to mean a test which fairly measures the knowledge or skills required by the particular job or class of jobs which the applicant seeks, or which fairly affords the employer a chance to measure the applicants ability to perform a particular job or class or jobs."
>
> * * *

and advocated "* * * that tests be judged against job performance rather than by what they claim to measure."

The Guidelines on Employee Selection Procedures adopted on August 1, 1970 by the EEOC superseded the 1966 guidelines, and added stringent and technical standards with respect to job relatedness.

Further amended guidelines are presently under consideration by the Equal Employment Opportunity Coordinating Council (EEOCC).

[33] *Barlow* v. *Collins,* 397 U.S. 159, 166 (1970); *NLRB* v. *Boeing Co.*, 412 U.S. 67, 76-77 (1973) (dictum). Like statutory construction and principles of equity, the allocation of proof and the proper weight to be accorded evidence are matters properly within the province of the courts.

> "Because the material herein is interpretive in nature, the provisions of the Administrative Procedure Act (5 U.S.C. §533) requiring notice of proposed rule making, opportunity for public participation, and delay in effective date are inapplicable."[34]

Indeed, This Court, in *Espinoza* v. *Farah Manufacturing Co.*, 414 U.S. 86, 94 (1973) has held with respect to the EEOC "Guidelines on Discrimination Because of National Origin":

> "The Commission's more recent interpretation of the statute in the guideline relied on by the District Court is no doubt entitled to great deference but that deference must have limits where, as here, application of the guideline would be inconsistent with an obvious congressional intent not to reach the employment practice in question." (Citations omitted)

i. Job Analysis

The principal defect found by the Court of Appeals was that Dr. Tiffin had not conducted a detailed job analysis in connection with his validation study in the manner required by the EEOC Guidelines. Before discussing the particular reasons for which the Court of Appeals found a job analysis necessary, it will be useful to discuss when, in general, a job analysis should or should not be required.

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[34] Thus the intricate technical burden imposed on employers by the 1970 EEOC Guidelines on testing marked a radical departure from previous practice, without the benefit of any input by employers.

When the proposed amended guidelines containing similarly restrictive standards were opened for public comment by the EEOCC, the impact of those guidelines on industry was made clear. The people who testified described them as "unworkable," "incomprehensible," "technically unsound," "too stringent," "beyond the state of the art in psychology," "ambiguous, yet restrictive," "unnecessary," "punitive," and, as one person said, "just irrational, unreasonable, and impossible." BNA, Daily Labor Report, No. 8 (Jan. 13, 1975).

A validation study may be conducted in a variety of factual circumstances for various purposes, and may employ various strategies such as content, construct, or criterion related, i.e., predictive or concurrent studies.

Thus, when a test publisher or psychologist sets out to devise and market a test, he must conduct a "job analysis" in order to demonstrate to potential clients the job content or duties for which the test has been correlated.

Similarly, if an expert psychologist were employed to set up a testing program for a particular plant, he would first of all study the jobs to learn what abilities were required, in order to obtain an indication of what tests might be valid job predictors; he would then select a test and, by empirical study, would determine if it correlated with job performance.

By contrast, the validation study here was intended to examine the validity of the tests already in use. The problem, therefore, was not to select among various tests to measure some unknown job content, but to determine if an existing test correlated with known job performance. In this context the preliminary "job analysis" for selecting the test was superfluous.[35]

The fundamental point overlooked by the Court of Appeals is that a test has almost no chance of correlating with job performance ratings unless it in fact measures critical job attributes. *Boston Chapter, NAACP* v. *Beecher,* 504 F.2d 1017, 1024 (1st Cir. 1974); *Vulcan Society, supra,* 490 F.2d

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[35] American Psychological Ass'n, Inc., *Standards for Educational and Psychological Tests and Manuals* (1966) (A. 1520-58), relied upon by Plaintiffs, expressly states at the outset (Standard A1):

> "Not all the standards in this report will apply to any one particular test. A standard may be ignored if it is irrelevant in the light of the purpose of the test and claims made for it. . . ." (A. 1592)

at 396. In light of the high statistical significance of the correlations here, the Court of Appeals Panel's speculation that only a written job analysis could assure that the supervisors and the tests were measuring the same thing exalts form over substance.

While for good reasons Albemarle does not have written job descriptions, (A. 223-24) the job categories for wage purposes are the result of union-employer negotiations. The job content is directly related to the machinery and equipment on which the job holder works, and the lines of progression are designed to group functionally related jobs for training purposes, as well as seniority, especially in the skilled lines of progression. (A. 211-212) Thus, the characteristics of the jobs are clearly understood.

Further, Dr. Tiffin was very familiar with paper mills,[36] having made validation studies for International Paper Company, The Mead Paper Corp., Marathon Paper Company and Gulf State Paper Company and having been consultant to the American Paper Institute from 1965 for the purpose of analyzing the use of the personnel tests being made by the member companies of that association.[37]

Thus, to say the tests were not proven to be job related, because Dr. Tiffin did not write down in his report what he knew about the jobs is unjustified as the dissenting Senior Circuit Judge aptly noted:

> "Secondly, in view of the findings by the [District] Court that validation studies had been applied to the

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[36] In Kraft Mills the jobs and machinery are basically the same, varying only with the technological advancement of the particular mill. Therefore, the organization for training and progression is quite similar in all mills. (R. 822-826)

[37] See Defendants Exhibit No. 22 (A. 439-57); A. 161. Dr. Tiffin's work was favorably received in *Stevenson* v. *International Paper Co.*, 352 F.Supp. 230 (S.D. Ala. 1972).

personnel tests and that the tests had been proved to be job related, I cannot join in the determination that discrimination resulted from the absence of 'job analysis.' It seems to me that these findings necessarily recognize that the equivalent of 'job analysis' was utilized. In rating the employees, the jobs' features were undeniably considered, for the supervisors were unquestionably familiar with these elements."

ii. Supervisors' Ratings

In his validation study, Dr. Tiffin used the "paired comparison" method of obtaining job success criterion ratings from supervisors.[38] Judge Dupree described the process in *his* findings of facts:

> "Each employee in a job grouping was individually rated in comparison to every other individual employee in that grouping to obtain a ranking of job performance. The ratings took into consideration the elements of work behavior and job success. This rating method was performed twice by two different supervisors making independent evaluations. Neither of the raters had access to or knowledge of the sample employees' performance on the aptitude tests. The results of the dual ratings were then averaged to obtain the final job rating of the employees within each specific unit." (A. 490)

Thus, the supervisors were asked only the most elemental question: "which of two of the employees who work for you can do the job better?" The Court of Appeals finds this simple question to be a "vague standard."

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[38] This method was specifically approved in *Watkins* v. *Scott Paper Co.*, ... F. Supp. ....., 6 F.E.P. Cases 511, 537 (S.D. Ala. 1973).

Citing one case, not in point,[39] and a stray quotation from a law review article[40] and the EEOC guidelines,[41], the Court of Appeals concluded:

> "We agree that some form of job analysis resulting in specific and objective criteria for supervisory ratings is crucial to a proper concurrent validation study. *See, Western Addition Community Organization* v. *Alioto,* 340 F.Supp. 1351, 1354-55 (N.D. Cal. 1972). To require less is to leave the job relatedness requirement largely to the good faith of the employer and his supervisors. The complaining class is entitled to more under the Act."

The Court of Appeals Panel's overemphasis of "job analysis" as "crucial" was apparently based on a confusion between "content validity" studies such as that attempted in *Western Addition Community Organization* v. *Alioto,* 340 F. Supp. 1351 (N.D. Cal. 1972), cited by the Court, and the more reliable "empirical validation" successfully performed in this case. Unquestionably "[t]he cornerstone in the construction of a content valid examination is the job analysis." *Kirkland* v. *Department of Correctional Services,* 374 F.Supp. 1361, 1373 (S.D. N.Y. 1974), since the tasks identi-

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[39] *Rowe* v. *General Motors Corp.*, 457 F.2d 348, 358 (5th Cir. 1972), which questioned the subjective recommendations of foreman for employees to be promoted to foreman, where almost no blacks were ever recommended. This is an entirely different evaluation from that involved here.

[40] Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion,* 82 Harv. L. Rev. 1598, 1662 (1969), the quotation from which has no citation to any scientific authority to support it.

[41] "In view of the possibility of bias inherent in subjective evaluation, supervisory rating techniques should be carefully developed, and the ratings should be closely examined for evidence of bias." 29 C.F.R. § 1607.5(b)(4) (1970).

fied in the analysis provide the only criteria against which to evaluate the test. In empirical validation studies, however, where the test can be measured against actual job performance rather than a mere description of job performance, the job analysis is far less important.

> "In the jargon of psychometrics, predictive [empirical] validation involves comparing relative performance on a given test with subsequent job performance.
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> * * *
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> Content validation of a test, on the other hand, requires that an analysis of the job involved be undertaken to determine what characteristics are essential for the adequate performance of that job." *Pennsylvania* v. *Glickman,* 370 F.Supp. 724, 732 (W.D. Pa. 1974).

The thrust of the law review quotation and that of the guidelines is based upon the premise that blacks, generally, perform less well on tests than whites, but perform as well on the job and therefore, if because of bias, supervisors rate blacks lower, this would tend to make the test seem valid when, in fact, it would merely reflect parallel bias. Recent scientific studies find the underlying premise that blacks who do poorly on a valid test do just as well on the job unfounded.[42]

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[42] This premise is, in the jargon, called "differential validity." In one recent study of thirteen validity studies, the author concluded that there is very little evidence of differential validity. Boehm, *Negro-White Differences in Validity of Employment and Training Selection Procedures; Summary of Research Evidence,* 56 Journal of Applied Psychology 33 (1972). *See also* Gael & Grant, *Employment Test Validation for Minority and Nonminority Telephone Company Service Representatives,* 56 Journal of Applied Psychology 135 (1972); Schmidt, Berner & Hunter, *Racial Differences in Validity of Employment Tests: Reality of Illusion* 58 Journal of Applied Psychology 5 (1973).

Aside from the fact that there is no scientific support for that idea, it clearly was not applicable in this case, and was not raised in the District Court.

Only four black employees participated in the validation study conducted by Dr. Tiffin, and those four were all in group No. 8. Therefore, in fact, in nine out of the ten groups studied, racial bias could not have been a factor. Group No. 8 consisted of eight employees (six black and two white) in the jobs of Chipper Unloader, Chipper Operator No. 2 and Chain Operator in the Woodyard. Two of the black employees refused to take the tests, so that four blacks and two whites constituted the group. Both the Beta and the Wonderlic B correlated for Group No. 8. Although Dr. Tiffin had all of his work papers available in Court, he was not asked for the test scores or supervisory ratings of the employees in Group No. 8. Thus, even for Group No. 8, the Court of Appeals Panel relies on a surmise, raised for the first time in the Court of Appeals, that the four blacks did poorly on the tests, and did as well or better on the job than the whites, but that both supervisors rating them independently downgraded their job performance in the precise degree necessary to achieve correlation. The possibility that this could have occurred is obviously remote, and does not provide a basis for invalidating Albemarle's whole testing program.

Further, a supervisor is in the best position to know the relative job performance of his employees. As long as the District Judge, in his role as trier of fact, is satisfied that the supervisor is reporting honestly, the rating cannot be said to be unduly "vague."

In this instance, the Court of Appeals disagreed more with the District Court's factual conclusions than with its legal standard. When the Court of Appeals criticized the lack of

job analysis, it essentially found a failure by Albemarle to meet a burden of proof. The District Court's findings clearly recognized that the burden had been carried. The Court of Appeals' conclusion that this was not enough constitutes a reversal on factual grounds, which was unwarranted since those findings of fact are not "clearly erroneous." FED. R. CIV. P. 52; *Parmer* v. *National Cash Register Co.*, 503 F.2d 275 (6th Cir. 1975); *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948) *modified*, 339 U.S. 960 (1950).

Thus, it is apparent that the Court of Appeals was in error in reversing the District Court on the basis that all supervisory ratings are presumptively biased.[43] This Court has already held that subjective or individual judgments concerning minority employees cannot automatically be equated with racial prejudice. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 803 (1973).

iii. Business Necessity

The Court of Appeals concluded that it was error "to approve the testing procedures for lines of progression not validated" and "to approve requiring applicants to pass two tests for positions where only one test was validated." (A. 519) The Court of Appeals found that Albemarle had not shown that "hiring all employees into a pool is necessary to the safe and efficient operation of its business," nor had it shown that "hiring employees for specific lines of progression is not an acceptable alternative." (A. 519-520)

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[43] Most validation studies in the United States, including the United States Training and Employment Service General Aptitude Test Battery (GATB) which is in wide use throughout the United States, are based on supervisory ratings. Thus if the Court of Appeals was correct, tests which Congress has expressly authorized would be presumptively invalid.

It is manifest that these objections of the Court of Appeals go to the manner in which the tests should be utilized and are irrelevant to the question whether the tests are job related. These objections may be grounds for modifying the District Court's order, but they are not grounds for enjoining the use of tests completely, as the Court of Appeals has done.

Furthermore, the objections basically derive from the Court of Appeals Panel's apparent belief that Albemarle was requiring tests "for 14 lines of progression" in "8 departments." Apparently this belief was based on a stipulation of fact which was correct as far as it went, but did not take into account the subsequent evidence at trial which clearly demonstrated that many of such lines of progression and departments no longer existed. (A. 244-245) Although the District Court did not specifically note these changes in the lines of progression (A. 487), the uncontroverted record discloses that at the time of Dr. Tiffin's study, Albemarle was using its tests only for the skilled lines of progression in the Technical Service, Power Plant, B Mill Paper and Pulp Mill Departments, which were the lines Dr. Tiffin was asked to study. (A. 186).

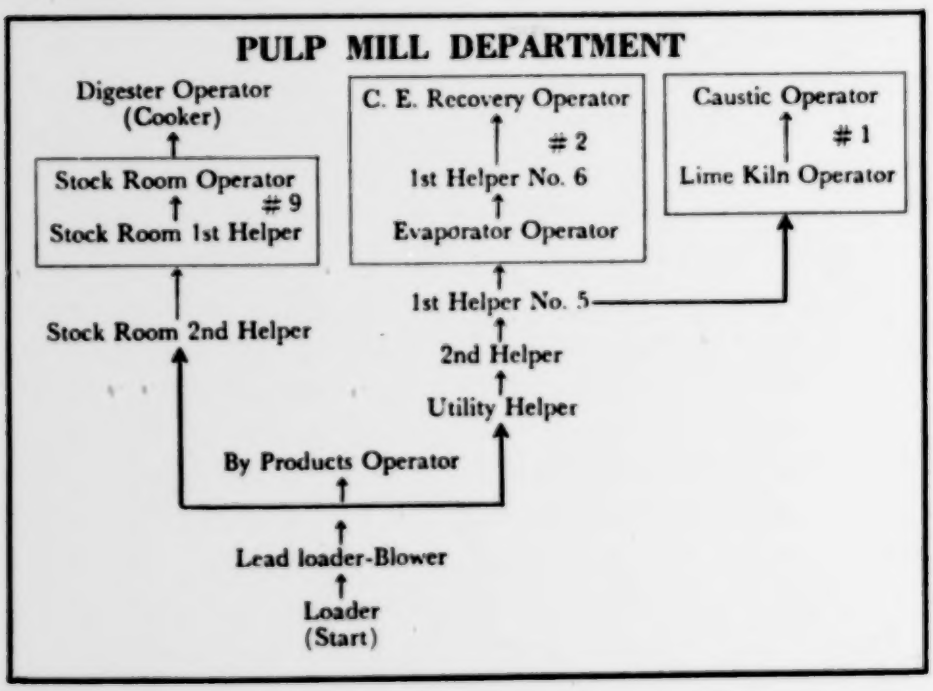
Dr. Tiffin's study found that the Wonderlic A" correlated positively with job performance in all the lines of progression in those departments except the B Paper Mill Stockroom and the Pulp Mill C. E. Recovery Operator lines of progression. So the question really is whether the entire testing program should be cast aside because the

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" Wonderlic B scores are examined only in the event Wonderlic A is not passed. See A. 220. Beta's use, of course, is permissible everywhere since it has no disparate effect on blacks and whites. See pp. 29-30, *supra*.

District Court permitted the use of the Wonderlic in two lines of progression—one involving a total of twelve jobs, the other six jobs—or whether on the basis of Dr. Tiffin's findings and the circumstances of the Mill it was reasonable to allow the testing procedure to stand. It is Albemarle's contention that use of tests in both the C.E. Recovery Operator and Stockroom lines was reasonable and appropriate.

In the Pulp Mill Department, the lines of progression do not start with the bottom job but branch out at higher levels so that an employee can be several jobs up the ladder before he will divert into the Digester Operator, the C.E. Recovery Operator or the Caustic Operator line of progression. In the Pulp Mill Department, the Wonderlic A correlated significantly in Groups 9 and 1, but only the Revised Beta had significant correlation in Group 2 in the C.E. Recovery line of progression:



In this department, therefore, clearly Albemarle cannot predict in which line of progression an employee will be needed. To preserve the safe and efficient operation of its pulp mill, it is reasonable to require *all* employees entering this line to pass the Wonderlic A as well as the Beta.

Consequently, it is only as to the B Paper Mill Stockroom line of progression that a specific compelling reason for using the Wonderlic may not have been shown. However, it is unreasonable to disrupt the entire hiring system at the mill for so small a group. Nor does so small an inconsistency destroy the overall conclusion of the expert that it is reasonable to use the Wonderlic for the skilled lines of progression generally.

Finally, the majority opinion holds that Albemarle "has not shown that hiring all employees into a pool is necessary to the safe and efficient operation of its business, nor has it shown that hiring employees for specific lines of progression is not an acceptable alternative." This holding misses the point because the use of a pool is no more discriminatory *per se* than hiring directly into a line of progression. How the hiring is done is what may cause the discrimination. Unless it is assumed that Albemarle is requiring satisfactory test scores as a condition of employment for all applicants for the pool and thereby making the tests indirectly applicable to lines of progression for which the tests are not validated, there is no discrimination by reason of the tests. There is no evidence to support that assumption and no reason to doubt that Albemarle is limiting its tests to potential candidates for the "skilled lines" of progression. The District Court, whose job it was to fashion the remedy in this case, made specific provisions for the operation of the Extra Board or "pool" in its order so as to insure against the possibility of unfairness in its operation.

It is abundantly clear, if not precisely stated, that due to the modernization of the mill and the elimination of various Departments, the Extra Board or "pool" is a device for sharing the available work among the many employees who would otherwise have been completely displaced. For Albemarle it has the advantage of flexibility in work-force.

There was no suggestion made that some other method of handling this situation might be less subject to discriminatory effect. To require Albemarle to conjure up some other system and disprove that it would have less discriminatory effect is unreasonable, if not unreal.[45]

Albemarle respectfully submits that the Court of Appeals had no basis upon which to reverse the District Court's refusal to enjoin its testing program and, therefore, the Court of Appeals should in turn be reversed by this Court.

B. In Any Event The Court Of Appeals Erred In Not Remanding The Issue To The District Court.

The Court of Appeals panel concluded its discussion of testing by stating:

> "Thus we hold that the district court erred in upholding the validity of the pre-employment personnel tests and in refusing to enjoin their use."

The final word of the opinion is simply, "Reversed." Such bare reversal on the testing issues is improper on several

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[45] The propriety of a "no alternative" requirement is not clear. Title VII imposes a heavy burden on defendants after a *prima facie* effect on minorities is shown. Imposing impossibly strict standards on private employers collides directly with the business efficiency that is the backbone of ths country's economic power.

grounds and the Court of Appeals Panel should instead have remanded to the District Court with permission to reopen the record.

Even if we were to assume that the Court of Appeals was correct on the merits, its decision has the effect of setting forth the new rule that an employer has the burden of proving job relatedness in strict accordance with the EEOC guidelines and the standards of proof detailed therein. Simple fairness requires that Albemarle, against which the new rule has been invoked, should be afforded an opportunity to present evidence with the new rule in mind. *McDonnell Douglas Corp.* v. *Green, supra; England* v. *Louisiana Medical Examiners,* 375 U.S. 411 (1964). Under practically the same circumstances, the Court of Appeals for the Fifth Circuit has noted:

> "[S]tandards for testing validity comprise a new and complicated area of the law. While the Hite Study did not demonstrate compliance with the Act, we hesitate to penalize this litigant, the first to confront such a demanding burden of proof, for failing to introduce a more rigorous study. Had our standards been articulated at the time of trial, it may be that the company could have proven its compliance. Therefore, rather than now proscribing the testing program which Georgia Power has used, we remand this phase of the case to the trial court with directions to permit the company a reasonably prompt opportunity to validate the testing program applied to the plaintiffs, in accordance with the principles enunciated in this opinion." *Georgia Power supra,* at 917-18.

A bare reversal allowing no further consideration by the District Court is especially inappropriate in light of the further fact that the Court of Appeals Panel under-

took to make factual determinations on issues as to which the District Court did not, and was not requested to make findings.

Thus the Court of Appeals Panel erred in its finding that tests were required at the time of trial in fourteen lines of progression in eight departments; they were in fact being utilized only in eight lines of progression in four departments.[46]

Similarly, in applying the literal language of Section 1607.4(c)(1) of the guidelines, the Court of Appeals said it did not reach the question of whether a testing procedure which takes into account higher-level job requirements is permissible:

> ". . . because of insufficient evidence below as to the time it takes an employee to progress to the higher level job."

No such time computation was made by the District Court because the issue was not injected into the case until the *Amicus Curiae* filed its brief in the Court of Appeals. But in fact the raw data with which to make the computations was in evidence and available to the District Court.[47]

Even worse, the Court of Appeals Panel made a finding as to the disparate racial effect of the Wonderlic test scores based on a document introduced in evidence in the Court of Appeals after all briefs had been filed. Obviously, Albemarle had no chance to probe the evidentiary value of that document, nor did the District Court have

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[46] See *supra*, p. 13.

[47] Plaintiffs' Exhibit No. 10 shows how long it took each employee to promote to each and every job. Hence, to determine how long it, in fact, took to progress from job to job would be a simple matter of computation.

opportunity to pass upon its relevance to or impact on the issues raised in this case.[48]

At the very least, the District Court should have been given the chance to determine the facts upon which issues not presented to the District Court were to be decided. *Commissioner* v. *Duberstein*, 363 U.S. 278, 292-293 (1960).

> "It is not the function of an appellate court to read the transcript of the evidence for the purpose of determining the essential facts before applying the law of the case." *Woods Construction Co.* v. *Pool Construction Co.*, 314 F.2d 405, 407 (10th Cir. 1963).

C. The District Court Had Traditional Equitable Discretion To Determine Whether Back Pay Was An Appropriate Remedy.

1. Title VII Leaves The Award Or Denial Of Back Pay To The General Equitable Discretion Of The District Courts.

In the instant case, the District Court declined to award back pay to the plaintiffs based on the cumulative effect of several equitable factors.[49]

In what was apparently the first Title VII case to do so, the Court of Appeals below reversed the trial judge's discretionary refusal to award back pay by adopting a "special

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[48] See *supra*, pp. 30-31.

[49] First, the court found that no evidence was presented of bad faith non-compliance with Title VII's requirements on the part of Albemarle Paper Company. Second, the court found that in its geographic area Albemarle had consistently paid among the highest wages at all levels of employment. Finally, the court found that Plaintiffs' tardy claims for monetary relief in the form of back pay, coupled with their express disclaimer of any intent to seek such monetary relief for non-named class members at the outset of the instant litigation substantially prejudiced the Defendants. (A. 498)

circumstances" test under which once a violation is found, a back pay award is mandatory absent special circumstances which would render such an award unjust. (A. 523-524)[50] It is submitted that the "special circumstances" test severely distorts Congressional intent, as evidenced by the plain language of Section 706(g) of Title VII, 42 U.S.C. §2000(e)-5(g), and operates to reduce traditional concepts of equitable discretion in the trial courts to a nullity.

Section 706(g), 42 U.S.C. §2000e-5(g), provides that if the district court in a private Title VII action finds that the respondent has intentionally engaged, or is intentionally engaging, in the unlawful employment practice alleged,

> "the Court *may* enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as *may* be appropriate, which *may* include, but is not limited to, reinstatement or hiring of employees, *with or without back pay* . . . or any other equitable relief *as the court deems appropriate.*" (Emphasis added).

Use of the word *may* in defining the enforcement or remedial powers of a court or agency normally signifies the grant of general equitable discretion to invoke, or refrain from invoking, the authority conferred.

The Civil Rights Act of 1964 is replete with careful distinctions between use of the word *shall* and the word *may*.[51]

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[50] Other courts of appeals have since adopted varying versions of the special circumstances test for reviewing the District Courts' Title VII decrees involving back pay. See e.g., *Duhon* v. *Goodyear Tire & Rubber Co.*, 494 F.2d 817, 818 (5th Cir. 1974); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 252-53, (5th Cir. 1974); *Head* v. *Timken Roller Bearing Co.*, 486 F.2d 870, 876 (6th Cir. 1973).

[51] *Compare*, 42 U.S.C. §§2000a, 2000a-1(a), and 2000a-2, *with* 42 U.S.C. §2000e-3(a).

Moreover, the legislative history of Section 706(g) conclusively establishes that the word *may* was intended to confer discretionary remedial powers on the District Courts. In an effort to conform Title VII remedies to those granted to the NLRB under the National Labor Relations Act, 29 U.S.C. §160(c)[52], early versions of the Title VII provided that:

> "If the court finds that the respondent has engaged in or is engaging in an unlawful employment practice . . . the court . . . *shall order* the respondent to take such affirmative action, including reinstatement or hiring of employees, with or without back pay . . ." (H.R. 7152 § 707(e)) (emphasis added).

However, the word *may* was substituted for *shall* in the Mansfield-Dirksen amendment adopted on the Senate floor.[53]

This legislative history demonstrates that the grant of remedial authority in Section 706(g) is inherently equitable in nature and the question of back pay, like that of other forms of equitable relief, is left to the discretion of the trial court.

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[52] Plaintiffs in this case and the Fifth Circuit in *Pettway, supra* at 252, attempt to analogize Title VII to the National Labor Relations Act. The analogy should not be drawn, in the first instance, because back pay awards are mandated by use of the word *shall* in the latter. 29 U.S.C. §160(c). Moreover, even the National Labor Relations Board has discretion over back pay awards, unfettered by a special circumstances rule. See *Phelps Dodge* v. *N.L.R.B.*, 313 U.S. 177, 198 (1941).

[53] Senator Dirksen commented that:

> "The mandatory requirement for affirmative action, including reinstatement and backpay, upon a finding of a violation has been revised to read 'may * * * order such affirmative action as may be appropriate, which may include reinstatement and backpay.' " 111 Cong. Rec. 12819 (1964).

Indeed, there has never been any question that the above-quoted language vests the District Courts with discretion in fashioning relief.[54] The question in this case is whether that discretion is properly limited by a "special circumstances" rule or whether it is governed by traditional equitable principles.

Albemarle recognizes that judicial review is not eliminated by the discretionary nature of the District Court's remedial powers under Title VII; the discretion must be exercised consistently with legislative objectives.[55]

In *Griggs* v. *Duke Power Co.*, 401 U.S. at 429-30 (1971) This Court defined the purpose of Title VII as follows:

> "The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."

This Court's interpretation is supported not only by the plain language of Title VII, but also by its legislative history. Thus, in the sectional analysis of H.R. 7152 written by the House Judiciary Committee it is stated:

> "The purpose of this title is to eliminate, through the utilization of formal and informal remedial procedures discrimination in employment based on race, color, religion or national origin." (H.R. Rep. No. 914, 88th Cong., 1st Sess. (Title VII (1963)).

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[54] *See, e.g., Curtis* v. *Loether*, 415 U.S. 189, 197 (1974); *Head* v. *Timken Roller Bearing Co.*, 486 F. 2d 870, 876 (6th Cir. 1973) ("Congress evidently intended that the award of back pay should rest within the sound discretion of the trial judge"); *United States* v. *N. L. Industries, Inc.*, 479 F.2d 354 (8th Cir. 1973) (discretionary denial of back pay upheld due to unsettled state of law in Circuit).

[55] *Hecht Co.* v. *Bowles*, 321 U.S. 321 (1944).

It is, therefore, an erroneous extension to assert that, "The clear purpose of Title VII is . . . to make whole, in a pecuniary fashion, those who have suffered by [all proscribed discriminatory practices]," *Bowe* v. *Colgate Palmolive Co.*, 416 F.2d 711, 720 (7th Cir. 1969). Clearly, Congress wished to end racial discrimination in employment. But the Congressional emphasis was on the prospective elimination of discriminatory practices and not on reparations. The hard-fought battle over remedies for a Title VII violation, including the substitution of the District Courts for the EEOC as the trial forum, and the substitution of *may* for *shall* in Section 706(g), indicate that Congress had no preconceived notions that compensatory damages in addition to injunctive relief would be appropriate "absent special circumstances." Rather, Congress wished to leave resolution of complex remedial problems to the traditional, discretionary powers of the federal courts of equity.[56]

The "special circumstances" rule adopted by the Court of Appeals for application to the back pay remedy derives from This Court's decision in *Newman* v. *Piggy Park Enterprises, Inc.*, 390 U.S. 400 (1968). *Newman* was an action under

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[56] In *Kober* v. *Westinghouse Electric Co.*, 480 F.2d 240 (3d Cir. 1973), the Court of Appeals for the Third Circuit recognized the vital role of the District Courts' discretion in formulating relief and expressly rejected the "special circumstances" rule adopted by the court below for that reason:

> "We must admit that these cases from the Fourth Circuit and Seventh Circuit severely limit the circumstances under which a trial judge may deny back pay. However, on this record we are inclined to follow the more persuasive reasoning of the Sixth Circuit in Manning v. General Motors Corp., supra, [466 F.2d 812] at 815-816; the Ninth Circuit in Schaeffer v. Yellow Cabs, Inc., supra, [462 F.2d 1002] at 1006-08; the Fifth Circuit in LeBlanc v. Southern Bell, supra, [460 F.2d 1228] and the dissenting opinion of Judge Boreman of the Fourth Circuit in Moody v. Albemarle, supra." (Footnote omitted). 480 F.2d at 247.

Title II of the Civil Rights Act of 1964, 42 U.S.C. §2000a-1 *et. seq.* in which This Court held that successful plaintiffs in such cases should ordinarily be awarded attorney fees absent special circumstances which would render such an award unjust. This Court reasoned that private litigants in Title II cases[87] act not for themselves alone, but as private attorneys general, vindicating a policy concerning public accommodations that Congress considered of highest priority. *Newman, supra,* at 402.

The recovery of back pay, being compensatory for past individual injury (see p. 66, *infra*), is vastly different from attorney fees for "private attorneys general" for advancing the commonweal. No compelling public purpose mandates an award of such private relief to Title VII plaintiffs.

2. The Discretion Of A District Court Regarding The Back Pay Remedy Should Be Guided By Traditional Equitable Principles.

The real difficulty with a "special circumstances" rule is that it deprives the trier of fact (who is most familiar with the ambiance of the case and the merits of each position) of an opportunity to formulate an award in the light of traditional equitable principles.

Complex equitable factors affect whether back pay is an appropriate remedy in a Title VII action. In *Georgia Power supra* at 922, for example, the Court held in relation to back

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[87] The provisions for attorneys' fees under Title II and Title VII are virtually identical. *Compare* 42 U.S.C. §2000e-5(k) *with* 42 U.S.C. §2000a-3(b). Each was deemed by Congress as sufficiently significant to be expressed in an identical subsection of each Title. The authority for the grant or denial of back pay in Title VII is found among the general equitable remedies. 42 U.S.C. §2000e-5(g). Congress obviously intended separate treatment of attorneys' fees and back pay, affording the latter no greater presumption of appropriateness than its companion remedies.

pay, that equity demands that a true balance of interests be struck. The Court set forth a list of factors to be considered which, it cautioned, was illustrative and not exhaustive: (1) whether back wages are properly owing; (2) limitations and laches; (3) factors of economic reality; and (4) physical and fiscal limitations of the court to grant and supervise the relief. For other cases demonstrating complex equitable factors, see *Norman* v. *Missouri Pac. Ry. Co.,* (497 F.2d 596 (8th Cir. 1974), *cert. denied,* .... U.S. ...., 43 U.S.L.W. 3413 (U.S. Jan. 28, 1975); *United States* v. *St. Louis & S.F. Ry.,* 464 F.2d 301, 311 (8th Cir. 1972), *cert. denied;* 409 U.S. 1107 (1973); *Shaeffer* v. *San Diego Yellow Cabs, Inc.,* 462 F.2d 1002, 1006 (9th Cir. 1972); *Le Blanc* v. *Southern Bell Telephone and Telegraph Co.,* 460 F.2d 1228, 1229 (5th Cir.) *cert. denied,* 409 U.S. 990 (1972); *United States* v. *Dillon Supply Co.,* 429 F.2d 800, 804 (4th Cir. 1970); *Johnson* v. *Georgia Highway Express, Inc.,* 417 F.2d 1122, 1125 (5th Cir. 1969).

Two equitable factors present in this case were expressly cited by the District Court to support its denial of back pay. One was absence of bad faith non-compliance by Albemarle.

Albemarle submits that, while it may be argued that good faith in and of itself may not be sufficient cause for a denial of back pay, good faith is, at a minimum, a relevant factor which must be considered in balancing the equities to formulate an appropriate remedy.[58] A number of courts have so held in Title VII cases. See *Norman* v. *Missouri Pac. Ry. Co., supra; Kober* v. *Westinghouse Elec. Corp.,* 480

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[58] The District Court's finding of Albemarle's good faith is amply supported on the record. Albemarle engaged in affirmative recruitment of blacks at an early point; Albemarle merged its Extra Boards and some lines of progression to enhance the opportunities of blacks; and, as judicial gloss was put upon Title VII, Albemarle took early steps to ensure its compliance. (See pp. 14-16 supra).

F.2d 240 (3rd Cir. 1973); *United States* v. *N.L. Industries, Inc.*, 479 F.2d 354 (8th Cir. 1973); *United States* v. *St. Louis & S.F. Ry., supra.* Those cases which have held that good faith is irrelevant or that it is an inadequate defense to a back pay claim[30] have apparently relied on This Court's observation in *Griggs, supra:*

> "We do not suggest that either the District Court or the Court of Appeals erred in examining the employer's intent; but good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." 401 U.S. at 432.

It must be remembered that This Court in *Griggs* was speaking of good faith as a defense to a finding of a violation. Clearly a fundamental distinction exists between good faith as it relates to the continued maintenance of a discriminatory employment practice which must be eliminated to effectuate the purpose of the Act, and good faith as it relates to an award of money damages. Where the fundamental purpose of the Act—the prospective elimination of obstacles to equal employment opportunity—is in issue, This Court has properly found good faith irrelevant. Where the prospective elimination of discriminatory barriers to employment has been achieved and the issue is reduced to whether an employer should be forced, by an award of back pay, to pay again for work already performed and paid for, good faith is clearly a relevant consideration.

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[30] See e.g., *Waters* v. *Wisconsin Steel Works*, 502 F.2d 1309 (7th Cir. 1974); *Baxter* v. *Savannah Sugar Refining Corp.*, 495 F.2d 436 (5th Cir. 1974) *cert. denied*, ... U.S. ....., 43 U.S.L.W. 3306 (U.S. Nov. 26, 1974); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974); *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974); *Head* v. *Timken Roller Bearing Co.*, 486 F.2d 870 (6th Cir. 1973).

A second factor, of even greater importance in this case, is the conduct of the plaintiffs. Plaintiffs' complaint, filed August 25, 1966, sought only injunctive and other equitable relief. In response to Albemarle's Motion [to dismiss as a class action and] for Summary Judgment filed October 5, 1966, plaintiffs formally represented to the Court, "no money damages are sought for any member of the class not before the Court." (A. 13-14). Plaintiffs' purpose for disclaiming back pay was clearly to qualify their suit as a class action under Rule 23(b)(2), Federal Rules of Civil Procedure. It was not until four years had passed that Plaintiffs injected back pay claims into the case.[80] The long delay in adding the back pay claims satisfies all the elements of laches—a traditional equitable concern that the Court of Appeals found to be an insufficient "special circumstance."

Plaintiffs' disclaimer at the time of Albemarle's Motion for Summary Judgment created the justifiable conclusion that Plaintiffs were not pursuing their back pay claims. Furthermore, Plaintiffs clearly knew their rights under the Act, and their delay is not justifiable.

All defendants have been prejudiced by Plaintiffs' tardy assertion of a claim which Plaintiffs initially disavowed. Discovery relating to individual claims was clearly rendered much more difficult, if not impossible, by the passage of time.

Moreover, the parties have changed positions. Hoerner Waldorf Corporation, at the time an innocent third party, purchased Albemarle's assets in 1968 in the belief that in this suit plaintiffs were not seeking damages. Thus, the claim of laches is meritorious.

Plaintiffs should not be permitted to excuse their laches by resort to Rule 54(c) of the Federal Rules of Civil Proce-

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[80] The first official indication that back pay would be in issue was in the District Court's Memorandum Opinion and Order entered September 29, 1970. (A. 37-38).

dure, relied on in *Robinson* v. *Lorillard,* 444 F.2d 791 (4th Cir. 1971), to uphold a discretionary grant of back pay despite the claim's tardy assertion. This is not merely a case of a tardy assertion of the claim. Plaintiffs at the outset *expressly* disavowed any intent to seek back pay. The substantial prejudice to Albemarle is amply demonstrated above.[61] The Fourth Circuit in *Robinson* cited with approval the following language from *Rental Development Corp. of America* v. *Lavery,* 304 F.2d 839, 842 (9th Cir. 1962):

> "If, however, it is made to appear that the failure to ask for particular relief substantially prejudiced the opposing party, Rule 54(c) does not sanction the granting of relief not prayed for in the pleadings."

Therefore, the substantial prejudice to Albemarle caused by plaintiffs' express disavowal of back pay claims mandated the District Court's denial of an award of back pay in this case.

The Court of Appeals' "special circumstances" rule, is at best a vague standard. District Courts are hardly better guided by "special circumstances" than by traditional equitable principles.

Moreover, the District Court was never granted the opportunity to apply the "special circumstances" rule to the facts of this case. Had it been granted such an opportunity, the District Court may well have articulated further factors present in this case in justification of its denial of back pay. Thus, the Court may have explicitly cited the speculative nature of back pay relief in Title VII cases[62], the unsettled

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[61] The District Court's finding of substantial prejudice (A. 498) to Albemarle cannot be said to be clearly erroneous.

[62] Since Title VII litigation is "rightful place" litigation, back pay awards must take into consideration, on an individual basis for each alleged discriminatee, (1) selection of the presumably appropriate

state of Title VII law during the pendency of this action[63], the absence of unjust enrichment to Albemarle[64], and the real failure of plaintiffs to make their case for back pay[65] as equitable factors which it considered in reaching its result.

Not only is a "special circumstances" rule in conflict with the plain language of the Act, it is inimical to the prompt elimination of "built-in headwinds" to equal employment opportunity. As a practical matter, a special circumstances rule will serve to inhibit voluntary conciliation of Title VII claims. Thus, if the granting of any form of injunctive relief will result in the virtually automatic triggering of back pay liability, every employer, however well intentioned, will, out of fear of back pay judgments, be compelled to oppose each item of requested injunctive relief, even if it be with respect to matters such as seniority which can benefit only employees— both black and white—and not the employer. Such employers will surely not, as Albemarle did, voluntarily consent to entry of injunctive relief of the type sought by plaintiffs.[66]

Finally, the Court of Appeals reversed the District Court's denial of back pay only after deciding that the factors cited

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"rightful place", (2) whether the employee would have achieved that employment status absent the violation, and (3) more typical inquiries such as interim earnings.

[63] See *United States* v. *N. L. Industries, Inc.*, 477 F.2d 354, 380 (8th Cir. 1973).

[64] See, e.g., *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 399-400 (1946) (Emergency Price Control Act); *Shultz* v. *Mistletoe Express Service Inc.*, 434 F.2d 1267, 1272 (10th Cir. 1970) (Fair Labor Standards Act).

[65] In this case the plaintiffs have failed to produce at trial particularized proof of their monetary claims, despite the direct indication by the District Court that claims for back pay would be considered at trial (See *supra*, pp. 19-20)

[66] See *supra* pp. 20-21.

by the District Court were individually insufficient to amount to special circumstances. Clearly the Court of Appeals erred in considering the District Court's reasons for denying back pay as isolated factors and not in their totality.[67]

Since the decision of the Court of Appeals, by adapting *Newman's* special circumstances rule to back pay claims effectively precludes the trial court from considering traditional equitable principles in deciding whether or not to award back pay, it should be reversed.

3. Even Under A "Special Circumstances" Standard, The District Court Was Justified In Denying Back Pay.

The factors cited by the District Court in denying back pay—Albemarle's good faith and Plaintiffs' tardiness in filing the claim—are of sufficient importance when taken together with the other factors mentioned above, to amount to special circumstances justifying the denial of back pay.

D. Back Pay Should Not Be Awarded To Class Members Who Did Not File Charges With The Equal Employment Opportunity Commission.

Upon the theory that back pay is merely a part of equitable relief, the Court of Appeals for the Fourth Circuit in *Robinson* v. *Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971), followed below, permitted the recovery of back pay by all

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[67] See *Kober* v. *Westinghouse Electric Corp.*, 480 F.2d 240, 248 (3d. Cir. 1973):

> "The statute says that the court may order such affirmative action as may be appropriate, with or without back pay. It is our determination that this language clearly leaves the award or denial of back pay to the discretion of the district court *to be exercised in the light of all the circumstances of each case.*" (Emphasis added).

members of a Rule 23(b)(2) class in a Title VII action.[68] Without specifically considering the issue, the *Lorillard* decision confers on the courts by the device of nomenclature (i.e. "class action") jurisdiction to award individual monetary relief to persons who otherwise have no jurisdictional standing before the Court. The decisions of This Court are to the contrary. *Zahn* v. *International Paper Co.*, 414 U.S. 291 (1973); *Snyder* v. *Harris*, 394 U.S. 332 (1969).

It is one thing to bring a class action seeking prospective relief from policies or practices generally applicable to a class, such as a discriminatory seniority system, since the relief will apply to the class members, whether or not represented in the proceeding. It is quite another matter to bring an action for monetary relief on behalf of hundreds of individuals who may or may not have been actually damaged by application of broad practices to them.[69] Clearly back pay is redress for an individual wrong. Even the decision below in this case warned that back pay is limited to damages which are actually suffered. (A. 524)[70]

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[68] To the same effect: *Bowe* v. *Colgate Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969); *Franks* v. *Bowman Transportation Co.*, 495 F.2d 398 (5th Cir. 1974) *cert. denied* .... U.S. ...., 43 U.S.L.W. 3330 (U.S. Dec. 10, 1974); *Head* v. *Timken Roller Bearing Co.*, 486 F.2d 870 (6th Cir. 1973); and others.

[69] A critical factor ignored by the Court of Appeals is the very heavy burden of suit management that class-wide back pay cases would impose on District Courts. The speculative nature of the relief together with the individual proofs required would make even the administrative task of designating subclasses very difficult. The gathering, collating, and weighing of individual claims would be an even greater burden.

[70] See also *Johnson* v. *Goodyear Tire and Rubber Co.*, 491 F.2d 1364, 1375 (5th Cir. 1974):

> "There should be a separate determination on an individual basis as to who is entitled to recovery and the amount of such recovery."

The administrative complaint and conciliation procedures built into Title VII were an integral part of the legislative compromise which led to the enactment of the Civil Rights Act of 1964. Thereby the employer is given early notice of charges of discrimination filed against him, administrative investigation of such charges, and an opportunity to conciliate such charges as may have merit. Section 706(a), 42 U.S.C. §2000e-5(a). A court-made rule permitting class-wide back pay permits parties who have not filed a charge to circumvent this administrative process to the prejudice of employers. Not only are employers thus denied the protections provided by the statute, but are also denied timely notice of the nature and scope of the individual claims against them and the opportunity to prepare defenses to such individual claims.

Back pay claims are unique and personal to the individual. In a claim for injunctive relief, an employer who is unwilling to eliminate an allegedly discriminatory practice (such as job testing) in conciliation with one charging party, may reasonably be expected to adhere to the same position with respect to other individuals. By the same token, conciliation of injunctive matters with a single charging party is effectively conciliation with everyone similarly situated. In contrast, the fact that an employer is unable to reach agreement with one individual charging party regarding back pay does not preclude the possibility that such an agreement could be reached on other individual back pay claims. The eligibility of an individual for back pay turns upon the specific circumstances applicable to that individual. Thus, the success or failure of conciliation of one back pay claim turns on factors unique to the individual, and the filing and conciliation of charges by other individuals claiming back pay does not involve duplication of effort.

Judge Robert R. Merhige in *Austin* v. *Reynolds Metals Co.*, 327 F. Supp. 1145 (E.D. Va. 1970), summed it up succinctly:

> "The right to individual compensation, while an element of federal policy incorporated in the act, 42 U.S.C. §2000e-5(g), is not so important as injunctive relief from a policy injurious to the public as a whole. Individuals can consistently be required to prosecute administrative charges at their own initiative in order to be eligible for damages. Possibly the court in Antonopulos [v. Aerojet-General Corp., 295 F.Supp. 1390 (E.D. Cal. 1968)] believed that the charging party intended her submission to be a joint claim and honored it as such, or that at any rate the administrative agency had behaved accordingly. But to allow any individual to recover damages for a practice of which he has not complained administratively would frustrate the Commission's role in a manner which has been consistently disapproved. Johnson v. Seaboard Air Line Railroad Co., 405 F.2d 645, 1 FEP Cases 456, 69 LRRM 2916 (4th Cir. 1967). The Commission's conciliation efforts amount essentially to negotiations over a settlement satisfactory to all concerned and consistent with the Act. Success is not always complete, as this case shows. But there will be no genuine opportunity to conciliate if all of the aggrieved individuals are not before the Commission and the magnitude of their claims is not apparent. Therefore this Court holds that although non-charging parties may intervene on the issue of injunctive relief, they may not now sue for damages."

Thus, while there may exist a common question of law in Title VII cases, that is the only relation between the members of the class, and their back pay claims are no more than claims for individual redress, involving separate issues and sometimes conflicts of interests. Among the individual issues involved in computing whether damages warranting back

pay are actually suffered are: whether the individual was otherwise qualified by, for example, his experience, employment history and background, for the job or jobs in question; whether he actually applied for the job in question or would have applied absent a violation of the Act; whether, at the time of application a vacancy in the job existed; the pay rates of the individual and those of various jobs in question; and individual matters relating to mitigation (including interim earnings, see §706(g), 42 U.S.C. §2000e-5(g)).

There is no question that in order to have standing to bring an action under Title VII, an individual must have filed timely charges of discrimination with the EEOC. This is a jurisdictional requirement. *McDonnell Douglas Corp., supra* at 798; *Dent* v. *St. Louis & S.F. Ry. Co.*, 406 F.2d 399 (5th Cir. 1969); *Stebbins* v. *Nationwide Mutual Ins. Co.*, 382 F.2d 267 (4th Cir.), *cert. denied*, 390 U.S. 910 (1968); *Richardson* v. *Miller*, 446 F.2d 1247 (3d Cir. 1971); *Griffin* v. *Pacific Maritime Ass'n.*, 478 F.2d 1118 (9th Cir.), *cert. denied*, 414 U.S. 859 (1973); *Cox* v. *United States Gypsum Co.*, 284 F. Supp. 74, 76 (N.D. Ind. 1968), *aff'd*, 409 F.2d 289 (7th Cir. 1969).

In *Stebbins* v. *Nationwide Mutual Insurance Co.*, 382 F.2d at 268, (4th Cir. 1967) the Court held:

> "Having reviewed the legislative history of the Act, as well as its language, we agree with the District Judge that the Plaintiff could not bypass the federal agency and apply directly to the courts for relief. Congress established comprehensive and detailed procedures to afford the EEOC the opportunity to attempt by administrative action to conciliate and mediate unlawful employment practices with a view to obtaining voluntary compliance. The plaintiff must therefore seek his administrative remedies before instituting Court action against the alleged discriminator."

Therefore, the filing of a charge is jurisdictional and serves a very important purpose. In *Zahn* v. *International Paper Co.*, 414 U.S. 291 (1973), This Court upheld the refusal of a District Court to permit a case to proceed as a class action because the unnamed plaintiffs, having separate and distinct claims, did not individually satisfy the jurisdictional amount requirement. While *Zahn* involved jurisdictional amount, the principle is applicable here.

The decisions are unanimous that the jurisdiction of the Federal Courts is not available for the individual discrimination claims of persons who have not filed charges with the EEOC; and Rule 23 cannot be manipulated to confer jurisdiction where it does not otherwise exist. *Zahn, supra.*

The Federal Rules themselves prohibit the use of the class action device to circumvent statutory jurisdictional requirements. *Snyder* v. *Harris*, 394 U.S. 332, 337 (1969). Rule 82 provides explicitly that:

> "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein."

Quite apart from jurisdictional amounts therefore, Rule 82 prevents the manipulation of Rule 23 to bypass *any* jurisdictional requirements. *Weiner* v. *Bank of King of Prussia*, 358 F. Supp. 684, 694-96 (E.D. Pa. 1973); *Sperberg* v. *Firestone Tire and Rubber Co.*, 61 F.R.D. 70, 73-74 (N.D. Ohio, 1973).

Therefore, back pay, if any is held appropriate in this case, should be limited to the named plaintiffs.

VIII.

CONCLUSION

1. Affirm The District Court

After hearing eight days of evidence and having travelled to Roanoke Rapids and viewed the mill, the District Judge concluded that Albemarle's tests were job related and declined to enjoin their use. He did, however, enjoin the use of a high school education requirement and prescribed a seniority system based on "mill seniority" and a system for the non-discriminatory use of the Extra Board (or pool). In his discretion, the District Judge denied back pay. It is apparent from the record and from his findings of facts and conclusions of law, that the District Judge had diligently familiarized himself with all the ramifications of the case.

Albemarle submits that the District Judge was correct not only on the facts but also on the law. His order should be affirmed and after nearly nine years this litigation should be brought to an end. For those reasons, Albemarle requests This Court to reverse the Court of Appeals and affirm the judgment of the District Court.

2. Reverse The Court Of Appeals And Remand To The District Court For Further Proceedings

Even if the panel of the Court of Appeals were correct on the law, its decision still should be reversed by This Court and the case remanded to the District Court for further proceedings. The remand could conceivably be on a variety of issues depending upon This Court's views on the broad testing and back pay issues. Thus, Albemarle's secondary request for relief is that to the extent the District Court's de-

cision is not upheld that the case be remanded to the District Court for further proceedings.

Respectfully submitted,

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